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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 669

THE BIG SLOUGH DRAINAGE DISTRICT OF SEDGWICK COUNTY, KANSAS; THE RIVERSIDE DRAINAGE DISTRICT OF SEDGWICK COUNTY, KANSAS; THE PROTECTION DRAINAGE DISTRICT OF SEDGWICK COUNTY, KANSAS; VALLEY CENTER TOWNSHIP OF SEDGWICK COUNTY, KANSAS; PARK TOWNSHIP OF SEDGWICK COUNTY, KANSAS; WACO TOWNSHIP OF SEDGWICK COUNTY, KANSAS; DELANO TOWNSHIP OF SEDGWICK COUNTY, KANSAS; RIVERSIDE TOWNSHIP OF SEDGWICK COUNTY, KANSAS; SALEM TOWNSHIP OF SEDGWICK COUNTY, KANSAS; WM. D. McDOWELL, J. R. STEARNS, G. WILBUR, B. B. MEYER, H. W. RALSTIN, H. S. LOYD, AND E. CARL JONES,

Appellants,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS, AND THE CITY OF WICHITA, KANSAS,

Appellees

STATEMENT AS TO JURISDICTION

In compliance with the provisions of Paragraph 1 of Rule 12 of the Supreme Court of the United States, appel-

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lants present the following statement showing the basis upon which it is contended that this Court has jurisdiction upon appeal to review the judgment in question.

I. Opinion Below

The Supreme Court of Kansas, the highest court of Kansas in which a decision could be had in the actions submitted, in its decision in this case (166 Kan. 122),* a copy of which is appended as Exhibit "B", upheld the validity of Chapter 391 of the Session Laws of Kansas, 1945, as amended by Chapter 202 of the Session Laws of Kansas, 1947, now appearing as Sections 19-3301 to 19-3307, both inclusive, of the 1947 Supplement to the General Statutes of Kansas, which statutes authorize the plaintiffs to tax all property within the City of Wichita and the County of Sedgwick, in which said city is located, to pay the expense of a flood control project.

Appellants, who had obtained leave to intervene, made the objections that because of the facts alleged in appellants' answer as intervenors, which facts were by the pleadings admitted, the statutes were unconstitutional and void as repugnant to the Fourteenth Amendment to the Federal Constitution because, among other reasons, the statutes were arbitrary, wholly unwarranted, manifestly unreasonable, a flagrant abuse, and by reason of their arbitrary character, a confiscation of particular property.

The intervenors (appellants here), made the further objection that the so-called assessments for the flood control project to be laid upon property owners were not based upon benefits to be received by them, and that the assess-

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* The decision of the Kansas Supreme Court is found in Volume 166 of the Kansas Reports, beginning at page 122. A typewritten copy of the decision, appended as Exhibit "B" has had inserted in it (*) references to the paging found in the official report of the case. Reference will be made to such paging in Exhibit "B", *post*.

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ments were made wholly with the view of deriving revenues from the non-benefited land throughout the County and City for the benefit of property owners whose property would be benefited by the flood control project.

The intervenors alleged that the indirect benefits, if any, to the property outside the flooded area are so disproportionate and remote that to tax them on the same basis as property within the flooded area amounts to a taking of property without due process of law.

Intervenors also objected because Chapter 391 did not provide for notice and afforded taxpayers of Wichita and Sedgwick County no opportunity to be heard respecting the justice and validity of the total assessments for proposed public improvements. Reference to the Answer of Intervenors and to Part III, *post*, is necessary to ascertain all facts upon which the foregoing and other objections were based.

II. Jurisdiction

(a) *Statutory Provisions*

The statutory provisions believed to sustain the jurisdiction are:

1. Title 28, U. S. Code, Section 1257 (2):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity."

2. Title 28, U. S. Code, Section 2101 (c):

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit

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or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree unless, upon application for writ of certiorari, for good cause, the Supreme Court or a justice thereof allows an additional time not exceeding sixty days."

3. Title 28, U. S. Code, Section 2104:

"An appeal to the Supreme Court from a State court shall be taken in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree appealed from had been rendered in a court of the United States."

4. Revision, Title 28, U. S. Code, Section 23:

"Section 2 of the Act approved January 31, 1928 (Chapter 14, 45 Stat. 54), as amended is amended to read as follows:

" 'Sec. 2. All Acts of Congress referring to writs of error shall be construed as amended to the extent necessary to substitute appeal for writ of error.' "

(b) *Kansas Statutes, the Validity of Which Is Involved*

The Kansas Statutes, the validity of which is involved, are Chapter 391 of the Session Laws of Kansas, 1945, as amended by Chapter 202 of the Session Laws of Kansas, 1947, which statutes, as amended, now appear as Sections 19-3301 to 19-3307, both inclusive, of the 1947 Supplement to the General Statutes of Kansas, 1935, pages 341 and 342. A verbatim copy of these statutes is in the appendix to this Statement as to Jurisdiction and is designated Exhibit "A".

For the sake of brevity, these statutes will be referred to hereafter as Chapter 391 of the Session Laws of Kansas, 1945—or only as Chapter 391—and this shall be meant to include the 1947 supplement.

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The validity of Chapter 391 was drawn in question in the Supreme Court of Kansas on the ground that it is repugnant to the Fourteenth Amendment to the Constitution of the United States, and the decision of the Supreme Court of Kansas was in favor of the validity of the above statutes.

(c) *Date of Judgment and of Appeal*

The date of the judgment of the Supreme Court of Kansas sought to be reviewed is December 20, 1948. The date upon which this application for appeal is presented is March 4, 1949. The decision of the Supreme Court of Kansas was first announced on November 13, 1948, but a reading of the opinion discloses that it was not a final judgment. On December 2, 1948, intervenors filed a Motion for Rehearing. Under Rule 16 of the Rules of the Supreme Court of Kansas (162 Kan., page xiv), intervenors had twenty (20) days within which to file a Motion for Rehearing. Intervenors, on December 2, 1948, also filed a Motion for Judgment. The Motion for Rehearing and the Motion for Judgment were both denied December 20, 1948. The Petition for Appeal is timely.

III. Nature of Case, Rulings of Kansas Supreme Court, and Citations Believed to Sustain Jurisdiction

(a) *Nature of Case*

These are two original actions in mandamus (later consolidated) filed July 1, 1948, in the Supreme Court of Kansas, *ostensibly* to compel the defendant, Auditor of State, to register certain notes issued by plaintiffs in furtherance of a federal flood control project, but in *reality* to test the *constitutionality* of Chapter 391 of the Session Laws of Kansas, 1945, and the right of the City of Wichita, Kansas, and the County of Sedgwick to do certain flood control work (166 Kan. 122, at pages 123, 126). Appel-

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lants, who are the real parties in interest, filed a common answer. Registration of the bonds is required by G. S. 1935, Sections 10-106, 10-107 and 10-108. Except for the constitutional question, there is no question of the regularity of the transcript of the proceedings leading up to the issuance of the notes presented to the Auditor by both the City and the County (166 Kan. 122, at page 123).

In this Court, the question is whether Chapter 391, under all the *admitted facts* as stated in the Answer of Intervenors and the Answer of the Defendant, and as construed and applied in this case, is repugnant to the Fourteenth Amendment to the Constitution of the United States as authorizing the imposition of a tax which is so palpably arbitrary and unreasonably discriminatory that it offends the due process and equal protection clauses of the Fourteenth Amendment.

The intervenors filed answers to the Alternative Writs of Mandamus, which included all issues set out in the Answer of the Defendant, Robb. In the consideration of this case in the Kansas Supreme Court and in this Court, the allegations in the Answer of Intervenors, in view of the motions of plaintiffs to determine questions of law in advance of trial, and in view of the motion of intervenors for judgment, are to be taken as true, and were by the Supreme Court of Kansas considered as true (166 Kan. 122, pages 137 and 138).

Summary of Answer of Intervenors

Three drainage districts and six townships of Sedgwick County, and seven individuals alleging themselves to be taxpayers in the County, filed a common answer alleging facts with reference to the situation of each intervenor and raised the constitutional question that Chapter 391 was re-

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pugnant to the due process clause of the Fourteenth Amendment to the Federal Constitution (166 Kan. 122, at page 124).

Interests of Intervenors

The three drainage districts have a total area of 31,100 acres (R. 37, 38). The six townships have an area of 138,240 acres. The so-called Big Ditch which the County and City, with Federal aid, propose to build traverses the Big Slough Drainage District, the Protection Drainage District, and all six townships (Ex. 4; R. 38).

The Protection Drainage District has bonds outstanding totalling $15,990.00, out of a total of $120,000.00 issued (R. 38). The Riverside Drainage District's costs exceeded $84,000.00 (R. 84). The Big Ditch will decrease the tangible property of the district which is subject to taxation to pay the outstanding obligations of the drainage districts (R. 39). The respective drainage districts would be destroyed (R. 58). The townships will have property taken off the tax rolls in excess of $500,000.00 (R. 39). Fifteen bridges will be omitted (R. 55).

The real property owned by Intervenor McDowell, three tracts, is alleged and admitted by plaintiffs' motion to be from 40 to 100 feet above the highest high-water mark of the Big and Little Arkansas Rivers and can not receive any benefit from the project (R. 39, 40). It is also alleged and admitted by plaintiffs' motion that the personal property, valued at $440.00, will receive no direct or indirect benefit from the flood control project proposed by plaintiff (R. 40).

Intervenor Stearns owns vacant and unimproved lots in the City of Clearwater, Sedgwick County, Kansas, which are so situated that overflow water from the Big and Little Arkansas Rivers does not reach these lots, and it is alleged and admitted that these lots will receive no direct or indirect benefit as a result of the proposed plan of the plain-

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tiffs. His lots are within the water plane of the Ninnescah River which flows into the Arkansas River in Sumner County, Kansas (R. 40).

Intervenors Meyer and Ralstin own property in Sedgwick County near but not contiguous to the Big Ditch but which will be damaged by having the water table under their land reduced by drainage into the Big Ditch (R. 41).

Intervenor Loyd owns land in Sedgwick County north of the Big Ditch project and not contiguous thereto which will be damaged by water backed up by the lessees (R. 42).

All of the intervenors will be affected by having to pay taxes for the flood project of plaintiffs from which such intervenors will receive no benefit (R. 43).

Exhibits 1, 2, 3 and 4 (R. 55, 56, 57, 58) attached to the Answer and appended to this Statement as to Jurisdiction, show:

Exhibit 1—The outlines of Sedgwick County, the location of the City, the Big and Little Arkansas Rivers, the townships and drainage districts which are west of the City of Wichita.

Exhibit 2—Hachured areas representing that part of the City and County under flood waters during the April, 1944, flood, referred to in the Answer as the "flooded area" (R. 45).

Exhibit 3—The assessed valuation, by townships and cities, tabulated in part as follows:

	Personal	Real	Total
City of Wichita	$39,152,822	$127,046,114	$166,198,936
Sedgwick County	56,455,633	181,827,518	238,283,151

Exhibit 4—The general plan and profile of the 19-mile Big Ditch flood control project which plaintiffs desire to participate in with the Federal Government.

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The contour lines on Exhibit 4 show that the elevation of the Big Ditch at or about Oatville, Kansas, is 1300 feet; whereas, in and around Eastborough Village to the east, the elevation is 1340 feet, and in the northeast part of Exhibit 4, the elevation is 1440 feet. Contour maps can be obtained from the Department of the Interior which will show the elevation over all the county. However, from the contours discernible from Exhibit 4, it is apparent that only if it rained for forty days and forty nights, as in Noah's time, would the water reach the elevation of 1440 feet, and if that were to happen, even the Big Ditch would not save the City of Wichita from destruction.

To pay for rights of way, damages and other non-Federal expenses estimated by the Army in 1945 to amount to $2,942,000.00, which intervenors allege would exceed $4,000,000.00 due to increased costs (R. 58, 59), the City proposes to tax all real and personal property within the boundaries of the City at a uniform rate, and the County proposes to tax all the real and personal property within the boundaries of the County at a uniform rate (R. 50, 51).

Sedgwick County consists of twenty-eight townships having a total area of 645,120 acres (Ex. 1; R. 55). As shown by Exhibit 2 (R. 56) and the Answer of Intervenors (R. 45), the maximum acreage flooded by the flood in April of 1944 (the flood which had more land under water in parts of Wichita and Sedgwick County than any other flood before or since) was 15,970 acres, or approximately 2.5 percent of the total area of the County, the major portion of which was inundated for a period of less than ten days (R. 45). The total acreage of the City of Wichita is 15,104 acres, and the maximum acreage inundated in the City of Wichita by the 1944 flood was 3,112 acres, or 20.625 percent of the area of Wichita. The balance of the flooded area consisted of 12,858 acres outside the city limits (Ex. 2; R. 45).

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Inasmuch as it would be a gigantic task to determine accurately the value of personal and real property within the flooded area, it was alleged that the assessed value of land within the flooded area of the City of Wichita is less than $20,000,000.00, as compared with the total assessed value of all land in Wichita, which is $127,046,114.00 (Ex. 3; R. 46).

Intervenors allege that approximately 2.5 percent in area of the County is subject to being flooded, which area will be benefited by the proposed project of the plaintiffs, and that the plaintiffs propose to tax the remaining 97.5 percent in area of the real property of Sedgwick County, Kansas, for the benefit of approximately 2.5 percent in area of the County, said 97.5 percent receiving no benefit from the tax (R. 45).

Intervenors allege that in the City, more than 79 percent of the real property, on an area basis, will receive no direct benefit from the project for flood control because said property never has been, and so far as can be foretold by a study of previous floods for a period of fifty years, never will be covered by flood waters so as to inundate any part thereof (R. 54).

If the constitutionality of Chapter 391 is upheld, the amount of bonds that could be issued to be paid for by tax levied upon all real and personal property within the City and County is itemized as follows:

	Assessed Valuation	Rate	*Bonds Issuable
City of Wichita	$166,198,936	.05	$8,309,948
Sedgwick County	238,283,155	.005	1,191,415
Total Bonds			$9,501,363
*79% of the City Bonds	$6,564,858		
21% of the City Bonds	1,745,090		
* 97.5% of the County Bonds	$1,161,630		
2.5% of the County Bonds	29,785		

* NOTE: The cost of the improvement is to be met temporarily by the issue and sale of bonds and ultimately by the levy and collection of taxes upon all the lands in the City to pay for bonds issued by the City, and

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Intervenors further allege that the indirect benefits to the property outside the flooded area are so disproportionate and remote that to tax them on the same basis as property within the flooded area is grossly discriminatory and amounts to a taking of property without due process of law.

Intervenors further allege that the plaintiffs intend to tax property outside the flooded area with the view of deriving revenues from property so taxed for the benefit of properties within the flooded area, and that this is not upon the theory supported by the facts that the project sponsored by the plaintiffs would, in fact, inure to the benefit of all the property in Sedgwick County, Kansas (R. 51).

Intervenors allege that the City and County intend to tax in excess of $50,000,000.00 of personal property within the City and County to pay the cost of this flood control project, notwithstanding that the property to be benefited by

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upon all the lands in the City and County to pay for bonds issued by the County. The practical result is that the entire City is made a benefit and taxing district to pay the City's expense, and the entire County (which includes the City) is made a benefit and taxing district to pay the County's expense.

The implication from the above that 79 percent in area of the City would stand 79 percent of the tax is not accurate. Neither is the implication correct that 97.5 percent in area of the County would stand 97.5 percent of the tax. Different areas vary in valuation and, of course, improved City property is more valuable than most farm lands.

If the County were to issue bonds on the basis of .005 percent, the amount of bonds which would be issued against the property in the flooded area in the City, which has a valuation of $20,000,000.00, would be $100,000.00 on this valuation basis. If the City were to issue bonds on the basis of .05 percent, the amount of bonds which would be issued against the flooded area in the County, alleged to have a valuation of $20,000,000.00, would be $1,000,000.00. Thus, the amount of bonds which the flooded area, on a valuation basis, would be required to pay in taxes would be $1,100,000.00. The balance of the bonds which it would be possible to issue is $8,401,363.00, which amount would be paid by taxing the land outside the flooded area. Therefore, whether computed on an area basis or on a valuation basis, it should be apparent that the tax is arbitrary and disproportionate to the benefits.

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the flood control project is wholly real estate (Ex. 2; R. 52).

Intervenors further allege that certain public utilities would be compensated for damages sustained by them, and that no offset would be made to the utilities for special benefits which the utilities will receive by reason of the proposed flood control project. (R. 52).

Intervenors further allege that Chapter 391 is unconstitutional for the reason that it gives the property owners of Wichita and Sedgwick County no opportunity to be heard regarding the justice and validity of local assessments for the proposed public improvement. (570).

(b) *Manner and Method of Raising Federal Questions*

After intervenors filed their answer, plaintiffs filed Motions for Determination of Issues of Law in Advance of Trial (R. 28, 31). The motions admitted as true the allegations set forth in the Answer of Intervenors as above summarized. The federal issues of law so to be determined were stated in both motions as follows:

> "1. Is Chapter 391, Laws of Kansas 1945, G. S. 1947 Supp., 19-3301 to 19-3307, unconstitutional because it violates Section 1 of Article Fourteen of the Constitution of the United States, for any of the reasons set forth in the Answer of the intervenors or the Answer of the defendant?"

> "7. Would the fact that the construction of the proposed flood prevention project might lower the level of subterranean water under property non-adjacent to the big ditch described in the intervenors' Answer, render Chapter 391 unconstitutional or void, for any of the reasons set forth in said intervenors' Answer?

> "8. Is said Chapter 391 invalid because it provides for payment of bonds (in furtherance of said flood-control project) by general taxation upon all taxable property within the plaintiff county?"

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Upon these motions, the case was argued to the Supreme Court of Kansas and by its decision stating the law on the questions submitted, the Supreme Court of Kansas held Chapter 391 valid and held that it was not unconstitutional as being repugnant to the Fourteenth Amendment to the Constitution of the United States and that the factual situation alleged by the intervenors, and admitted by the plaintiffs to be true, is not sufficient in law to justify the refusal of the relief sought by plaintiffs (166 Kan. 122, 138). This decision was handed down on November 13, 1948.

On December 2, 1948, intervenors filed a Motion for Rehearing, and also a Motion for Judgment. We quote Intervenors' Motion for Judgment as follows:

> "Come now the intervenors and move the Court to enter judgment in favor of the intervenors and refuse to issue the writs of mandamus directed to the State Auditor for the reason that in view of the uncontroverted Answer of Intervenors, the writs of mandamus should not issue since Chapter 391 of the Session Laws of Kansas, 1945, as amended by Chapter 202 of the Session Laws of Kansas, 1947, now appearing as Sections 19-3301 to 19-3307, inclusive, of the 1947 Supplement to the General Statutes of Kansas, 1935, is unconstitutional and void and repugnant to the Fourteenth Amendment to the Constitution of the United States, and intervenors pray that the Court so hold." (R. 66)

(c) *Rulings of the Kansas Supreme Court.*

On December 20, 1948, the Supreme Court of Kansas overruled the Motion for Rehearing, denied the Motion for Judgment as prayed for, and entered judgment denying the Motion for Rehearing and denying the Motion for Judgment (R. 70, 71).

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In passing upon the constitutional question, the Supreme Court of Kansas said:

> "In a preliminary way it may be said that in each case the principal question raised is the constitutionality of Ch. 391, . . ." (l. c. 123)
>
> ". . . In our opinion, it may not be said the act is unconstitutional as being arbitrary, or confiscatory of private property, or that under its terms it results in taxation of one who does not receive some benefit from the tax." (l. c. 131)
>
> "With reference to Questions 1, 2 and 8, we conclude that Ch. 391 is not unconstitutional as depriving taxpayers of their right of due process of law under the fourteenth amendment of the federal constitution, nor their rights under article 11, section 1, of the state constitution, nor because it provides for the payment of bonds issued thereunder by general taxation upon all taxable property within the county (or city) for any of the reasons above mentioned." (l. c. 131)
>
> "Summarizing, we hold that Ch. 391 is not unconstitutional for any reason presented by the Answer of the auditor of the state of Kansas or by the answer of the intervenors, as mentioned and determined above."
>
> ". . . It is apparent also that the factual situation alleged by the intervenors is not sufficient in law to justify refusal of the relief sought by the plaintiffs. . . ." (l. c. 137)

Accordingly, the constitutional question was passed upon by the Kansas Supreme Court and is properly before this Court.

(d) *Citations Believed to Sustain Jurisdiction*

Appellants cite the following cases as sustaining the jurisdiction of the Supreme Court of the United States in this case:

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Myles Salt Co. v. *Bd. of Comm'rs.*, 239 U. S. 478, 60 L. Ed. 392 (1915) (Motion to dismiss appeal denied.)

Kansas City S. R. Co. v. *Road Improvement Dist. No. 6*, 256 U. S. 658, 65 L. Ed. 1151 (1921) (Writ of error upheld.)

Hancock v. *Muskogee*, 250 U. S. 454, 63 L. Ed. 1081 (1919) (Writ of error allowed.)

James Stewart & Co. v. *Sadrakula*, 309 U. S. 94, 84 L. Ed. 596 (1940) (Motion to dismiss denied.)

Cantwell v. *Connecticut*, 310 U. S. 296, 84 L. Ed. 1213 (1940) (Jurisdiction on appeal upheld.)

Winters v. *New York*, —— U. S. ——, 92 L. Ed. No. 13, Page 654 (1948)

IV. The Federal Question Presented Is Substantial

The test of whether the question presented under the Fourteenth Amendment to the Federal Constitution is substantial is defined in the opinions. It must not be frivolous. *Goodrich* v. *Ferris*, 214 U. S. 71; 51 L. Ed. 914 (1909); *Berkman* v. *U. S.*, 250 U. S. 114, 63 L. Ed. 877 (1919). Nor must it be without color of merit. *U. S., ex rel. Brown* v. *Lane*, 232 U. S. 598, 58 L. Ed. 748 (1914); *Corrigan* v. *Buckley*, 271 U. S. 323, 70 L. Ed. 969 (1926). It must deserve serious consideration. *U. S. Fidelity & Guaranty Co.* v. *Oklahoma*, 250 U. S. 111, 63 L. Ed. 876 (1919). A motion to dismiss must be denied where the protection of the Fourteenth Amendment is invoked in the answer and the defense is at least plausible upon its face. *American Sugar Rfg. Co.* v. *Louisiana*, 179 U. S. 89, 45 L. Ed. 102 (1900). It must not be so clearly lacking in merit as to afford no basis for the exercise by the Federal Supreme Court of its appellate jurisdiction over a state court. *Parker* v. *McLain*, 237 U. S. 469; 59 L. Ed. 1051 (1915). It should have a fair color of support, *Wilson* v. *North Carolina, ex rel., Caldwell*, 169 U. S. 586, 42 L. Ed. 865 (1898).

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If the question of constitutionality presented requires analysis and exposition for its decision, it may be said that the question is substantial. *Milheim* v. *Moffat Tunnel Imp. Dist.*, 262 U. S. 710, 67 L. Ed. 1194 (1923). The question cannot be foreclosed by prior decisions of the United States Supreme Court. *Minneapolis, St. P. & S. Ste. M. R. Co.* v. *Merrick Co.*, 254 U. S. 376, 65 L. Ed. 312 (1920); *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123, 58 L. Ed. 1245, Ann. (1914).

Tested by the foregoing, we believe to be substantial the question presented in this case, namely, whether Chapter 391, under the facts stated in the Answer of Intervenors and admitted by plaintiffs to be true, and as construed and applied in this case by the Kansas Supreme Court, is repugnant to the Fourteenth Amendment to the Constitution of the United States as authorizing the imposition of a tax which is so palpably arbitrary and unreasonably discriminatory that it offends the due process and equal protection clauses of the Fourteenth Amendment.

In *Houck* v. *Little River Drainage Dist.*, 239 U. S. 250, 60 L. Ed. 266 (1915), this Court stated that the legislature could "itself fix the basis of taxation or assessment; that is, may define the apportionment of the burden, and its action cannot be assailed under the Fourteenth Amendment unless it is palpably arbitrary and a plain abuse."

Appellants contend that this case clearly comes within the exception of the *Houck* case, *supra*, because under the facts in this case, the action of the Kansas legislature was "palpably arbitrary and a plain abuse." In the *Houck* case, *supra*, this Court cited *Norwood* v. *Baker*, 172 U. S. 269, 43 L. Ed. 443, and retained its principle. That the present case is within the exception laid down in the *Houck* case would appear from the following quotation from *Norwood* v. *Baker, supra:*

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"But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received.

"In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess,* a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is in-

voke to restrain the enforcement of a special assessment." (l.c. 278) (Emphasis supplied.)

Appellants also place reliance upon, and assert that the Kansas Supreme Court erred in not giving full consideration to the principles laid down in, *Myles Salt Co.* v. *Iberia Drainage Dist.*, 239 U. S. 478, 60 L. Ed. 392. In discussing this case, the Supreme Court of Kansas said:

> "Under the circumstances of that case, the allegations stood *undenied,* and the court held the inclusion of the land was the result of power arbitrarily asserted, imposed a burden without a compensating advantage, and that it resulted in confiscation of property of Myles, in violation of its rights under the fourteenth amendment." (Emphasis supplied.) (166 Kan. 122, 129.)

The appellants believe that there is no difference between the allegations in the *Myles Salt Company* case being "undenied" and the facts alleged in appellants' answer being admitted by the pleadings in the Supreme Court of Kansas. In this case before the Supreme Court of Kansas, the alleged facts were not only undenied—*they stood admitted as true.*

Because appellants believe that they are within the exception of the *Houck* case and are within the principles laid down in the *Myles Salt Company* case decided six weeks after the *Houck* decision, we quote at length from the *Myles Salt Company* case:

> "2. An island, which being high land, is not, and cannot be, benefited directly or indirectly by a drainage improvement, may not, consistently with the due process of law clause of U. S. Const., 14th Amend., be included within the drainage district solely for the purpose of deriving a revenue from the levy and collection of drainage taxes thereon for the benefit of other lands subject to be improved by drainage."

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l.c. 394:

"The ground of the attack is that the district for the construction and maintenance of which the tax was levied was of *no benefit to plaintiff's land* and was formed only for the benefit of the other lands, was an unconstitutional usurpation of authority, and was and is an effort to take plaintiff's property without due process of law, in violation of the 14th Amendment to the Constitution of the United States."

"• • • The trial court said the question presented by the demand was no longer an open one. The principle laid down by the courts, it was declared, is that the creation and determination of drainage districts being a legitimate and lawful exercise of discretionary powers, the courts are without power to impugn or inquire into motives 'where no fraud is pleaded.' • • •"

l.c. 395:

"We condense them narratively as follows: Weeks island, the property which is the subject of the controversy, is one of several islands, being the highest uniform elevation above sea level in southwest Louisiana. It rises abruptly 175 feet or more, is surrounded on two sides by bayous, on the rear by a salt-water marsh, and on the front by a bay (Virmillion bay), with a small strip of salt-water marsh intervening.

"Its topography is high and rolling, the drainage excessive, and washing and erosion are serious problems. The country around it outside of the sea marsh is thickly settled and presents the character of low lands as distinguished from high lands or uplands, reaching a maximum elevation of about 15 feet as against a maximum elevation of Weeks island of 175 feet.

"In lieu of needing drainage the problem the island is confronted with 'is to guard against *washing* and *erosion*, and that the drainage of all the territory be-

tween it and Bayou Teche on all sides and to all extents leads to the marshes subject to tidal overflow between it and the mainland.'

"Some years ago a drainage district, known as the Iberia & S. Mary Drainage District, was organized at the instigation of interested individuals for the purpose of drainage into the bayous and marshes surrounding Weeks island of certain lands lying between Bayou Teche and the marshes.

"*Solely with the view of deriving revenues from the assessment of Weeks island and the salt deposit therein, and only for the benefit of the other properties, and not upon the theory that a general scheme of drainage would inure to the benefit of all of the property therein, even indirectly, and not through an exercise of sound and legal legislative discretion, the island was included within the confines of the district.* In pursuance of such scheme and plan an election was held for the imposition of an ad valorem tax of 5 mills for a period of forty years upon which to predicate an issue of bonds. The election resulted in the imposition of the tax.

"It was not intended nor has it ever been intended, nor was it possible nor is it possible, to give any of the benefits of the drainage scheme to Weeks island or to the salt deposit therein, directly or indirectly, its inclusion in the district being solely and only for the purpose of deriving revenue therefrom for the special benefit of the other lands subject to be improved by drainage, without any benefit to plaintiff or its property whatever. The island is the highest assessed piece of property in the district, and has never received one single cent of benefit from the drainage system constructed and maintained in such district, and never can or will in the future receive any benefit whatever from the system."

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l. c. 396:

"We (the U. S. Supreme Court) cannot concur in the contention. It is true the law of the state as written is not attacked, but the law as *administered and justified by the supreme court of the state* is attacked, and it is asserted to be a violation of the Constitution of the United States. The question presented is Federal and the motion to dismiss is denied. And the considerations that move a denial of the motion move a decision of the merits of the question.

"The charge is that plaintiff's property was included in the district not in the exercise of 'legal legislative discretion,' not that the scheme of drainage would inure to the benefit of the property, even indirectly, but with the predetermined 'purpose of deriving revenues to the end of granting a special benefit to the other lands subject to be improved by drainage, without any benefit' to plaintiff 'or its property whatever,' present or prospective.

"Nothing could be more *arbitrary* if *drainage* alone be regarded. But there may be other purposes, defendants say, and, besides, that the benefit to the property need not be direct or immediate; it may be *indirect*, such as might accrue by reason of the general benefits derived by the surrounding territory. But such benefit is excluded by the averments, and it certainly cannot be said that the elevated land of Weeks island could be a receptacle for stagnant water, or would be otherwise a menace to health if not included within the district, or would defeat the purpose of the law, which seems to have been the ground of decision in George v. Young, 45 La. Ann. 1232, 14 So. 137.

"The case, therefore, is within the limitation of the power of the state as laid down in Houck v. Little River Drainage Dist., supra, which cites Norwood v. Baker, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. Rep. 187, and retains its principle. It has not the features which determined French v. Barber Asphalt Paving Co., 181 U. S. 324, 45 L. Ed. 879, 21 Sup. Ct. Rep. 625,

and the cases which have followed that case, and Phillip Wagner v. Leser (239 U. S. 207, ante, 230, 36 Sup. Ct. Rep. 66), decided coincidentally with Houck v. Little River Drainage Dist. and cited in the latter.

"It is to be remembered that a drainage district has the special purpose of the *improvement of particular property,* and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an *abuse of power* and an act of *confiscation.* Phillip Wagner v. Leser, supra. We are not dealing with motives alone, but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property, but solely of the improvement of the property of others,—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind." (Emphasis supplied.)

Paraphrasing the *Myles Salt Company* case, we have the following comment:

1. "That the district for the construction and maintenance of which the tax was levied was of no benefit to plaintiff's land and was formed for the benefit of other lands."—The same allegation is made as to appellants' land. (R. 51, 53.)

2. "It (the island) rises abruptly 175 feet or more" —likewise, part of Sedgwick County rises 140 feet above the level of the Big Ditch (Ex. 4.)

3. "Washing and erosion are serious problems"— this is no doubt true of land outside the flooded area as would appear from the fact that the topography is 140 feet higher than the height of the Big Ditch above sea level (Ex. 4).

4. "Solely with the view of deriving revenues from the assessment of Weeks Island . . . and only for the benefit of other properties"— similar allegation in intervenors' answer (R. 51).

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5. "Indirect benefits excluded by the averments"—similar allegations in appellants' answer (R. 40, 51).

6. "A drainage district has the special purpose of improvement of particular property"—a flood control district has the special purpose of keeping flood waters from particular lands.

Other cases supporting appellants' contention that the federal question presented is substantial are:

Gast Realty & I. Co. v. *Schneider Granite Co.*, 240 55, 60 L. Ed. 523 (1916)

Kansas City S. R. Co. v. *Road Improvement Dist. No. 6*, 256 U. S. 658, 65 L. Ed. 1151 (1921)

Thomas v. *Kansas City S. R. Co.*, 261 U. S. 481, 67 L. Ed. 758 (1923)

Road Improvement Dist. No. 1 v. *Missouri P. R. Co.*, 274 U. S. 188, 71 L. Ed. 992 (1927)

Nashville C. & St. L. R. Co. v. *Walters*, 294 U. S. 405, 79 L. Ed. 949 (1934)

We respectfully submit that the tax authorized by Chapter 391 is palpably arbitrary and unreasonably discriminatory because:

1. It authorized a tax on all real and personal property without respect to benefits.

2. It authorized a tax on property admittedly not benefited.

3. There was no apportionment of benefits.

4. There was no notice given nor opportunity to be heard allowed respecting the justice and validity of local assessments for the proposed flood control project.

5. There was no opportunity for appeal from the tax.

7. 2 5 percent of the County was within the flooded area, but all property, real and personal in the City and County will be taxed by the County to pay for the 2.5 percent in area directly benefited.

8. 20.625 percent of the City is within the flooded area, but all of the real and personal property in the City will be taxed to pay for the benefit to 20.625 percent in area.

The contentions made by appellants are not frivolous and without color of merit. They have a fair color of support and deserve serious consideration. They require analysis and exposition.

From a legal standpoint, therefore, we believe that the federal question is substantial. Also, a substantial amount of money, going into millions of dollars, is involved, and the health and economic welfare of in excess of 200,000 people in Wichita and Sedgwick County, Kansas, will be affected by this decision.

Wherefore, it is respectfully submitted that this appeal in the above entitled Court comes within the proper jurisdiction of this Court.

W. D. Jochems,
J. Wirth Sargent,
of Wichita, Kansas,
Counsel for Appellants.

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APPENDIX TO APPELLANTS' STATEMENT AS TO JURISDICTION

Exhibit "A"

Chapter 391, Session Laws of Kansas, 1945, as Amended by Chapter 202, Session Laws of Kansas, 1947, Now Appearing as Sections 19-3301 to 19-3307 of the 1947 Supplement to the General Statutes of Kansas.

"Article 33.—Flood Control

"19-3301. Counties traversed or touched by Arkansas river; powers of county commissioners. That in any county of the state of Kansas traversed or touched by the Arkansas river and in which the corps of engineers of the United States army or other department or agency of the federal government shall be authorized by the congress to construct works for the prevention, control, or mitigation of floods or flood hazards upon or along any river or the tributaries thereof, lying or situate within said county, the board of county commissioners thereof shall, if in their opinion the said construction is necessary for the public welfare, have the power and they are hereby authorized to: (a) Enter into an undertaking in the name of the county to hold the United States of America free from any damage to persons or property resulting during construction or after the completion thereof, (b) to contract with the federal government in the name of the county that when said work is completed the said county will maintain, keep in repair, and operate such flood control works, and (c) to furnish all necessary lands, rights of way and easements, as provided in section 2 (19-3302) of this act. (L. 1945, ch. 391, § 1; June 28.)

"19-3302. Same; eminent domain. That in any county, such as described in section 1 (19-3301), where it is required by the federal government as a condition to the construction of any flood control works as provided in this act, that the said county furnish the neces-

sary lands, rights of way, or easements therefor, the board of county commissioners of said county is hereby authorized and empowered to acquire such lands, rights of way, or easements as may be necessary and said board is hereby authorized and empowered to acquire the same by purchase or by gift or by the exercise of the right of eminent domain, and there is hereby conferred upon the board of county commissioners, of such county the right of eminent domain to be exercised in the manner prescribed by article 2 of chapter 26 of the General Statutes of 1935 and acts amendatory thereof or supplemental thereto. (L. 1945, ch. 391, § 2; June 28.)

"19-3303. Same; bonds; limitation; installments; tax levies. Whenever in such county it shall be necessary to acquire any lands, rights of way, or easements under the provisions of this act, the cost thereof and expenses connected therewith shall be defrayed by the issuance of general obligation bonds of the county, to be issued by the board of county commissioners of such county without the necessity of an election, either in one issue or in separate issues from time to time as may be necessary and as determined by the board of county commissioners of said county, the proceeds thereof to be used for such purposes and no other, except as herein otherwise provided. The aggregate of any such bonds so issued shall not be in excess of one-half of one percent of the assessed valuation of the county. All bonds issued under the provisions of this act shall mature in equal annual installments over a period of not more then ten years and it shall be the duty of the county commissioners of such county to make an annual levy on all the taxable property in such county for the retirement of the principal and interest thereof as the same shall become due. The bonds provided for in this act shall not be subject to nor included in any restrictions or limitations upon the amount of bond indebtedness of said county contained in any other law now affecting said county. (L. 1945, ch. 391, § 3; June 28.)

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"19-3304. Same; loss, damage or expense to county; insurance. That any loss, damage or expense for which the county or the board of county commissioners may be liable by reason of having entered into an indemnity agreement or undertaking to protect and defend the federal government against loss or damage resulting from or growing out of such flood control work may be paid for by said county from any funds on hand received from the sale of the bonds issued under the provisions of this act: *Provided,* That said board may for the purpose of saving and protecting the county from any such loss, damage or expense, apply for and purchase from any insurance or indemnity company authorized to transact business in this state, an insurance or indemnity policy or policies of insurance and pay the cost of obtaining the same from any funds received from the sale of bonds issued under the provisions of this act. (L. 1945, ch. 391, § 4; June 28.)

"19-3305. Same; tax levies for maintenance; repairs. For the purpose of maintaining and operating such flood control works as shall be constructed by the United States army corps of engineers or other agency of the United States government, when the same shall have been completed and turned over to the county, the board of county commissioners of such county shall be empowered to make an annual tax levy upon all of the tangible property within said county, in an amount not to exceed one mill, and such levy shall be in addition to all other levies authorized or limited by law. It shall be the duty of the board of county commissioners and the county engineer to keep all such flood control works in serviceable condition and to make such repairs as may, from time to time, be necessary. (L. 1945, ch. 391, § 5; June 28.)

"19-3306. Same; contracts for maintenance repair or operation. That for the purpose of carrying out any of the provisions of this act, the board of county commissioners are hereby authorized to enter into agreements with the United States of America or any

department or agency thereof and with any city or drainage district, or other county or body politic, as well as with any person, firm or individual whenever it shall be necessary as a condition to the construction of flood control works hereunder, and for the maintenance, repair or operation thereof. (L. 1945, ch. 391, § 6; June 28.)

"19-3307. Same; powers also vested in cities. Except as herein otherwise expressly provided, all of the rights, powers, authority and jurisdiction conferred on counties and boards of county commissioners by the provisions of sections 19-3301 to 19-3306, both sections inclusive, of the General Statutes Supplement of 1945 are hereby also conferred upon and vested in any city located in any county such as described in section 19-3301 of the General Statutes Supplement of 1945 and the governing body thereof. The governing body of any such city, in the name of the city, shall have the power to enter into undertakings and contracts and make agreements in like manner and for like purposes as the board of county commissioners are authorized by this act to enter into undertakings and contracts and make agreements in the name of the county; and may acquire lands, rights of way and easements either within or without the limits of the city in like manner and for like purposes as the board of county commissioners are authorized by section 19-3302 of the General Statutes Supplement of 1945 and may issue general obligation bonds of the city to pay the costs thereof and expenses connected therewith in the manner now provided by law; but the aggregate of any such bonds so issued shall not be in excess of one and one-half percent of the total assessed tangible valuation of the city: *Provided,* That governing body of any city may issue additional general obligation bonds of the city for such purposes not in excess of three and one-half percent of the total assessed tangible valuation of the city, but before such additional bonds may be issued, the governing body of the city shall submit the question of

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the issuance of such additional bonds and the amount thereof to the qualified electors of the city at a regular city election or at a special election called for that purpose as provided by law; *Provided further,* That the total aggregate of all such bonds which may be issued under the provisions of this section shall not be in excess of five percent of the total assessed tangible valuation of the city. Such bonds shall not be subject to, nor included in any restrictions or limitations upon the amount of bonded indebtedness of said city contained in any other law. Funds received from the sale of bonds by any such city may be used to pay any loss, damage, or expense for which the city or the governing body thereof may be liable in like manner as counties are authorized to pay such loss, damage or expense under the provisions of section 19-3304 of the General Statutes Supplement of 1945. For the purposes of maintaining and operating such flood control works as shall be constructed by the United States army corps of engineers or other agencies of the United States government, when the same shall have been completed and turned over to the city, and for the purpose of maintaining and operating any flood control works or dikes heretofore or hereafter constructed for the purpose of protecting such city from floods, the governing body of such city shall be empowered to make an annual tax levy upon all the taxable tangible property within said city, of not to exceed one mill and such levy shall be in addition to all other levies authorized or limited by law. It shall be the duty of the governing body of the city to keep all such flood control works and dikes in serviceable condition and to make such repairs as may, from time to time, be necessary. (L. 1945, ch. 391, § 7; L. 1947, ch. 202, § 1; June 30.)"

STATE OF KANSAS,
Supreme Court, ss:

I, Walt Neibarger, Clerk of the Supreme Court of the State of Kansas, do hereby certify, under the seal of the Court, that the foregoing pages, numbered 29 to 31, inclu-

sive, constitute a true, full and accurate copy of Chapter 391 of the Session Laws of Kansas, 1945, as amended by Chapter 202, Session Laws of Kansas, 1947, now appearing as Section 19-3301 to 19-3307, both inclusive, of the 1947 Supplement to the General Statutes of Kansas.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Topeka, Kansas, this 18th day of March, 1949.

WALT NEIBARGER,
Clerk of the Supreme Court.

[SEAL.]

Exhibit "B"

*122

No. 37,477

THE BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS, *Plaintiff*,

v.

GEORGE W. ROBB, Auditor of the State of Kansas, *Defendant*,

and

THE BIG SLOUGH DRAINAGE DISTRICT OF SEDGWICK COUNTY, KANSAS, et al., *Intervenors*

No. 37,478

THE CITY OF WICHITA, KANSAS, *Plaintiff*,

v.

GEORGE W. ROBB, Auditor of the State of Kansas, Defendant,

and

THE BIG SLOUGH DRAINAGE DISTRICT OF SEDGWICK COUNTY, KANSAS, et al., Intervenors

SYLLABUS BY THE COURT

1. The legislature has power to create drainage and flood control districts and when the nature of the case does not

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conclusively fix it, the power to determine what shall be a taxing district for a particular project is a legislative power, restricted only by constitutional limits.

2. The legislature may exercise its discretion in fixing a taxing district and its action in so doing is not open to judicial inquiry unless it is wholly unwarranted and a flagrant abuse and by its arbitrary character is a mere confiscation of particular property.

3. Benefits to a taxpayer conferred under drainage and flood control projects may be direct or tangible, or they may be indirect and intangible where they redound to the benefit of the whole taxing district in which he is a taxpayer.

4. If a law of a general form operates uniformly on all members of the class to which it applies, it is not open to the objection it is a special law if the classification is not an arbitrary and capricious one, nor in such case does it contravene Art. 2, § 17, of the Constitution of the State of Kansas.

5. The legislature has power to pass laws which apply to and operate uniformly on all members of a class, but the classification must be natural and genuine. The classification cannot be an arbitrary or fictitious one but must be based upon distinctions which have a reasonable and substantial relation to the subject matter involved. (*State, ex rel. v. Allen County Comm'rs,* 156 Kan. 248, 133 P. 2d 165.)

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6. Drainage districts and townships are creatures of the legislature and neither has any rights, in a case such as is set forth in the opinion, that the legislature may not alter at its pleasure.

7. The record examined in a mandamus proceeding, and questions of law submitted are answered, and it is *held* that Laws 1945, Ch. 391, as amended, and appearing as G. S. 1947 Supp. 19-3301, et seq., is not unconstitutional because in contravention of the fourteenth amendment of the Constitution of the United States, or in contravention of

Art. 2, §§ 1 and 17, Art. 11, § 1, and Art. 12, § 4, of the Constitution of the State of Kansas, for any of the reasons assigned, nor is the act otherwise invalid on account thereof.

Original proceeding in mandamus. Opinion filed November 13, 1948. Submitted questions of law answered.

W. F. Lilleston and *Wayne Coulson*, both of Wichita, argued the causes, and *L. A. Hasty, Fred W. Aley, Lawrence E. Curfman*, and *Howard T. Fleeson*, all of Wichita, were with them on the briefs for the plaintiffs.

Edward F. Arn, Attorney General, and *William Paul Timmerman*, Assistant Attorney General, were on the briefs for the defendant.

W. D. Jochems and *J. Wirth Sargent*, both of Wichita, argued the causes, and *Emmet A. Blaes, Roetzel Jochems, Robert G. Braden* and *S. C. Durbin*, all of Wichita, were with them on the briefs for the intervenors.

The opinion of the court was delivered by

THIELE, *J.:*

The questions herein determined arise out of two applications for writs of mandamus. Acting under the authority of Laws 1945, Ch. 391, as amended by Laws 1947, Ch. 202, now appearing as G. S. 1947 Supp. 19-3301, et seq., and usually referred to hereafter as Ch. 391, Sedgwick County and the City of Wichita each issued one temporary note under the provisions of G. S. 1947 Supp. 10-123, and presented it to the auditor of the State of Kansas for registration, preliminary to its sale under the requirements of G. S. 1935, Ch. 10, Art. 1, and such registration being refused the instant proceedings were commenced originally in this court by each of the above municipalities.

In a preliminary way it may be said that in each case the principal question raised is the constitutionality of Ch. 391, and as later appears the questions for decision are generally common to each proceeding. For convenience the Constitution of the United States will be referred to as the federal constitution and the Constitution of Kansas as the state constitution. There is no contention that the proceedings leading up to the issue of each note are irregular * 124 if Ch. 391 authorizing them is valid, and we do not note

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those proceedings which are alleged in some detail in the applications for the writs of mandamus. Alternative writs were issued directing the auditor to register the notes or to show cause why he should not, and he has answered alleging in substance that Ch. 391 is unconstitutional and void because in contravention of Art. 11, § 1, of the state constitution providing for a uniform rate of taxation, in contravention of the fourteenth amendment of the federal constitution and the above provision of the state constitution because it permits taxation of property not subject to flood hazard, and in contravention of Art. 2, § 17, of the state constitution as being special legislation where a general law could have been made applicable, and, insofar as the county is concerned, that Ch. 391, § 2, requires the city clerk and the city treasurer to act for the county and is an unlawful delegation of power.

Three drainage districts of Sedgwick County, six townships of the county and seven individuals alleging themselves to be taxpayers in the county, were given leave to intervene, and filed a common answer in both proceedings alleging facts with reference to the situation of each intervenor, making certain admissions and denials, raising the same constitutional objections as are included in the auditor's answer, and alleging further the statute violates Art. 12, § 4, of the state constitution pertaining to appropriation of rights of way.

With the issues thus joined the plaintiffs moved the court to determine in advance of trial, issues of law as stated in thirteen specified questions.

These questions were fully argued orally and are fully discussed in the printed briefs. It is not necessary that they be set forth. What is said hereafter under appropriate reference covers the matters urged.

A brief review of the statute involved discloses that the title to Ch. 391 as originally enacted in 1945 was, "An act relating to the construction of flood control works in certain counties and cities" and that by section one it is effective in "any county of the state of Kansas traversed or touched by the Arkansas river." The act provides that where the federal government undertakes flood control

works within the county, the board of county commissioners may enter into certain undertakings with the federal government to hold the United States of America free from any damage; to maintain, * 125 keep in repair and operate the flood control works and to furnish the necessary lands, rights of way and easements. Right of eminent domain is conferred upon the county "to be exercised in the manner prescribed by article 2 of chapter 26 of the General Statutes of 1935 and acts amendatory thereof or supplemental thereto." Provision is made for the issuance of bonds to pay the cost of acquiring rights of way or easements, and for the issuance of bonds without an election, the aggregate of such bonds not to exceed one-half of one percent of "the assessed valuation of the county," and it is the duty of the board of county commissioners "to make an annual levy on all the taxable property in such county for the retirement" of the bonds. It is also provided that for the purpose of maintaining and operating such flood control works as shall be constructed by the United States, the board of county commissioners shall be empowered "to make an annual tax levy upon all of the tangible property within said county." The last section of the act as originally enacted stated that except as therein otherwise expressly provided, all rights, powers, authority and jurisdiction conferred on counties and boards of county commissioners, are also conferred upon and vested in any city located in any county such as described in the act and upon the governing body thereof. This section was amended in 1947. For present purposes, however, it is noted the important difference between counties and cities is in the percentage of the amount of bonds that may be issued, and in the rate for which taxes may be levied to provide funds for maintenance and operation. For acquisition of lands, rights of way and easements, the city "may issue general obligation bonds of the city to pay the costs thereof and expenses connected therewith in the manner now provided by law" and for the purpose of maintenance and operation "the governing body of such city shall be empowered to make an annual tax levy upon all the taxable tangible property within said city." A reference to the entire act will disclose

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that the construction of any flood control works is determined and performed by the United States, the county or city entering into agreement (1) to hold the United States free from damage to persons or property resulting from construction or after completion, (2) to maintain and operate the works, and (3) to furnish all necessary lands, rights of way and easements, all as provided in the statute. The county, or city as the case may be, does not determine the extent or cost of the improvement, nor does it tax anyone therefor other than as stated. It may also be noted * 126 that there is no provision in the act for making special assessments upon any real estate that may be benefited by the improvement and in proportion to such benefit. Whether the act fixes the entire county or the entire city as a taxing district to pay demands upon it under the act, is noticed later.

In asking this court to rule on the questions submitted, the obvious purpose is to procure a declaration as to the soundness and validity of the several claims of unconstitutionality asserted in the answers of the defendant and of the intervenors. In view of the principle that constitutionality of a statute is presumed, and that the burden of establishing the contrary is on those asserting it (see cases mentioned in West's Kansas Digest, Constitutional Law § 48, and Hatcher's Kansas Digest, Constitutional Law § 16) and further for the reason the brief of the intervenors covers not only the same contentions made by the defendant state auditor, but others as well, we shall discuss generally the contentions as presented by the intervenors including but not making separate reference to the brief or contentions of the state auditor, except where necessary.

The greater part of the intervenors' brief is devoted to a discussion of Questions 1, 2 and 8, which raise the questions that Ch. 391 is unconstitutional because (1) it violates the fourteenth amendment to the federal constitution, (2) Art. 11, § 1, of the state constitution, and (3) it provides for the payment of bonds by general taxation upon all taxable property within the county (or city).

Limits of space prevent any detailed statement of facts alleged in the answer or as summarized in the brief, as a

basis for intervenors' argument. Generally, they direct attention to the fact that the drainage districts have made improvements at a large cost; that certain individuals intervenors own lands not subject to flood damage; that the water table will be lowered under the lands of others and their damage will be difficult of ascertainment; that another owns land subject to overflow but the improvement is not on his land; that all are affected by being taxed but will receive no benefit; that the amount of lands flooded comprise only a small fraction of the lands to be taxed; that personal property will be taxed notwithstanding the only property to be benefited is real estate; that no direct benefits are conferred on property outside the flooded area; that the project gives sanction to construction for the benefit of private as well as public property; that certain public utilities * 127 will be compensated for damages but not charged with benefits; that certain bridges are omitted from the project and that the amount of bonds permitted is not sufficient to pay the amount charged to the county (or city).

Insofar as unconstitutionality under the state constitution is concerned the intervenors and the defendants rely principally on *Putnam v. City of Salina,* 136 Kan. 637, 17 P. 2d 827, (reh. den. 137 Kan. 731, 22 P. 2d 957), stressing particularly language appearing on page 641 that an obvious infirmity in the statute (R. S. 12-645) was that it gave sanction to the construction of a project of flood control for the benefit of private as well as public property, the cost whereof was to be met by levy of a general tax upon all the city. When the Putnam case was decided the statute had been amended, and the discussion was only to meet a contention that its inclusion *rendered* the entire original act unconstitutional and not subject to amendment which cured the claimed defect. The contention was not sustained. Notwithstanding the language stressed by intervenors, the court recognized that the rule is that taxation must be for a public and not merely a private purpose, that the taxes must be properly apportioned and the district taxed must have a special interest in and be specially benefited by the thing for which the taxes are levied. See page 657 and Syl. ¶ 4. It is noted also that the statute there under discussion pro-

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vided for the creation of a particular benefit district, and, in view of what is later said herein, it may be doubted that the case is very much in point.

In *Roby v. Drainage District*, 77 Kan. 754, 95 Pac. 399, it was recognized that the legislature has power to create drainage districts and provide for assessments, and that when the nature of the case does not conclusively fix it, the power to determine what shall be a taxing district for a particular project is a legislative power, restricted only by constitutional limits.

In *Railroad Co. v. Leavenworth County*, 89 Kan. 72, 79, 130 Pac. 855, wherein the constitutionality of a drainage act (Laws 1905, Ch. 215) was involved, this court recognized the act provided two methods, one by special assessment and one by general tax upon the taxable property of the district; that in adopting the latter, there was no requirement, as in case of special assessments, for notice and that a special notice or hearing "is not essential to a valid levy of a general tax in a taxing district legally created." And see also *Johnson County Comm'rs. v. Robb*, 161 Kan. 683, 693, 171 P. 2d 784, and cases cited.

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Insofar as unconstitutionality under the federal constitution is concerned the intervenors, as well as plaintiffs, rely principally upon *Houck v. Little River District*, 239 U. S. 254, 60 L. Ed. 266, 36 S. Ct. 58, and quote from it at length. In that case the question was whether a flat tax over the entire district to defray preliminary expense violated constitutional rights and it was held that it did not and that Houck was not deprived of his property without due process of law and in violation of the fourteenth amendment of the federal constitution. We cannot here quote at length, as do the intervenors, stressing particular words or phrases, clauses or sentences on which they rely. In that case however the court said:

> "In view of the nature of this enterprise it is obvious that, so far as the Federal Constitution is concerned, the State might have defrayed the entire ex-

pense out of state funds raised by general taxation or it could have apportioned the burden among the counties in which the lands were situated and the improvements were to be made. *County of Mobile v. Kimball*, 102 U. S. 691, 703, 704. It was equally within the power of the State to create tax districts to meet the authorized outlays. The legislature, unless restricted by the state constitution, can create such districts directly, or, as in this case, it may provide for their institution through a proceeding in the courts in which the parties interested are cited to appear and present their objections, if any. The propriety of a delegation of this sort was a question for the state alone. And with respect to districts thus formed, whether by the legislature directly or in an appropriate proceeding under its authority, the legislature may itself fix the basis of taxation or assessment, that is, it may define the apportionment of the burden, and its action cannot be assailed under the Fourteenth Amendment unless it is palpably arbitrary and a plain abuse. These principles have been established by repeated decisions." (citing authorities) (P. 262)

Intervenors state that the first sentence is dictum, but we note it was quoted approvingly in *Valley Farms Co. v. Westchester*, 261 U. S. 155, 67 L. Ed. 585, 43 S. Ct. 261. As bearing on the correctness of the principle stated in the above quotation see *Williams* v. *Eggleston*, 170 U. S. 304, 311, 42 L. Ed. 1047, 18 S. Ct. 617; *Mt. St. Mary's Cemetery* v. *Mullins*, 248 U. S. 501, 63 L. Ed. 383, 39 S. Ct. 173; *Milheim* v. *Moffat Tunnel Dist.*, 262 U. S. 710, 721, 67 L. Ed. 1194, 43 S. Ct. 694; and *Chesebro* v. *Los Angeles Co. Dist.*, 306 U. S. 459, 83 L. Ed. 921, 59 S. Ct. 622.

Although many other state and federal decisions are mentioned in the briefs which are not set forth here, they have been examined. We are of the opinion the true rule is that the legislature may exercise its discretion in fixing a taxing district and that its action in * 129 so doing is not open to judicial inquiry unless it is wholly unwarranted and a flagrant abuse, and by its arbitrary character is a mere confiscation of particular property.

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Although it is contended by the intervenors that no taxing district was fixed by the act, we cannot agree. There is nothing in the act that warrants any assumption the board of county commissioners have any power to create districts within the county, or that the governing body has any such power as to territory within the city. While there is no categorical statement in the act that the county and the city constitute taxing districts, that they are such is clearly evident from language used in the act fixing bond and tax levy limitations which, without exception, are spread over the whole county or the whole city, as the case may be.

On the proposition that the creation of the districts in such manner is wholly unwarranted and a flagrant abuse, resulting in a mere confiscation of property, the intervenors rely principally upon *Myles Salt Co.* v. *Iberia Drainage Dist.*, 239 U. S. 478, 60 L. Ed. 392, 36 S. Ct. 204, L.R.A. 1918 E. 190. In that case it had been alleged that the inclusion of a certain "island" was not upon any theory that a general scheme of drainage would benefit all of the lands taxed, even indirectly, but for the sole purpose of subjecting it to taxation. Under the circumstances of that case the allegation stood undenied, and the court held the inclusion of the island was the result of power arbitrarily exerted, imposed a burden without a compensating advantage and that it resulted in confiscation of property of Myles in violation of its rights under the fourteenth amendment.

Intervenors direct attention to *Morton Salt Co. v. City of South Hutchinson*, 159 F. 2d 897, in support of their contention that the proposed tax upon all of the property in the taxing district is palpably arbitrary and a plain abuse. The action in the district court was to enjoin issuance of water-works bonds. In the circuit court of appeals the question was the right of plaintiff to a preliminary injunction pending a final disposition of the cause in the district court. Although reference is made to the opinion for a more complete statement, in general it was contended that a tax for waterworks construction, forty-six per cent of which would be assessed against plaintiff's property which would receive no benefit from it, was palpably arbitrary and a plain abuse of power. It was held that the test of due process

in respect to taxation under the fourteenth • 130 amendment to the federal constitution is whether the taxing power exerted bears fiscal relation to the protection, opportunities and benefits given, and that where the tax imposed clearly results in such a flagrant and palpable inequality between the burden imposed and benefits received that it amounts to an arbitrary taking of property without compensation, it violates the due process clause. A reference to the opinion shows however that the court clearly recognized that the fourteenth amendment places only "extremely limited" restrictions upon the taxing power of a state, and that the federal constitution does not require precise equality or uniformity of taxation; that "it is no constitutional defense to a tax that the taxpayer is not directly benefited thereby, or is less benefited than others who pay the same or less tax;" that absolute equality of taxation is unattainable, but a law, the manifest purpose of which is discrimination and inequality, cannot be sustained. Authorities are cited in support of the several principles asserted. We quote only the following paragraph of the opinion:

> "(17) The benefits conferred may be direct and tangible, such as the paving of the street in front of taxpayer's residence or business, a water or sewer line to his door; or, it may be indirect and intangible, such as a waterworks or sewer system which, although unavailable to the taxpayer, nevertheless redounds to the benefit of the whole community of which he is a part. Certainly the tax is no less constitutional because the benefit conferred is indirect and intangible."

On the question that direct benefits are not required, see *Miller & Lux v. Sacramento Drainage Dist.*, 256 U. S. 129, 65 L. Ed. 859, 41 S. Ct. 404.

Notwithstanding some of the allegations of the intervenors' answer as to particular factual situations, we must take note of the fact that the Arkansas River enters Sedgwick County at its northwest corner and making somewhat of a curve to the east and then southeast passes out of the county about six miles west of the southeast corner of the

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county; that it flows through the west edge of the city of Wichita; that if not restrained in some manner it not only damages public property, but interferes with public business by impeding progress from either side of the river to the other and in and out of the city by those having business not only at the county court house, but with various state and federal offices thereof, as well as with other institutions whose activities are in the public interest. Neither can we accede to any contention that only real estate within so-called flood limits will receive a benefit. What is said above demonstrates that such is not the case. Even if there
• 131 were doubt about it, the legislature must be presumed to have surveyed the field and concluded that improvement without the city was for the benefit of the county as a whole and the improvement within the city was for the benefit of the city as a whole. To take isolated cases and say that one property owner, or a small group, will not be directly benefited, does not compel a contrary conclusion. Uninterrupted means of transportation from any part of the county or city to a public or semi-public institution in another part of the county or city is a benefit even though a beneficiary may not exercise his right to it. In our opinion, it may not be said the act is unconstitutional as being arbitrary, or confiscatory of private property, or that under its terms it results in taxation of one who does not receive some benefit from the tax.

We also note some argument by the intervenors that some of them may suffer consequential damages which they say they may not recover. Assuming that to be true, it would not render the act unconstitutional. In any event, we are not disposed at this time to rule on just what damages may be included in the undertaking between the county or city on the one hand and the federal government on the other to "hold the United States of America free from any damage to persons or property resulting during construction or after the completion thereof." (Laws 1945, Ch. 391, § 1, id. § 7, as amended by Laws 1947, Ch. 202, § 1, all appearing as G. S. 1947 Supp. Ch. 19, Art. 33.)

With reference to Questions 1, 2 and 8, we conclude that Ch. 391 is not unconstitutional as depriving taxpayers of

their right of due process of law under the fourteenth amendment of the federal constitution, nor their rights under Art. 11, § 1, of the state constitution, nor because it provides for the payment of bonds issued thereunder by general taxation upon all taxable property within the county (or city) for any of the reasons above mentioned.

Question No. 3 is whether Ch. 391 is unconstitutional because it violates Art. 2, § 17, of the state constitution for the reason it is special legislation. Intervenors direct special attention to the constitutional language that "in all cases where a general law can be made applicable, no special law shall be enacted." The gist of their argument is that it having been determined that the Arkansas River is a navigable river (The *State, ex rel. v. Akers*, 92 Kan. 169, 140 Pac. 637, Ann. Cas. 1916 B. 543, affirmed in *Wear v. Kansas*, 245 U. S. 154, 62 L. Ed. 214, 38 S. Ct. 55) the act could have been * 132 made general by substituting the word "navigable" for the word "Arkansas" as used in section one of the act; that there was just as much reason for passing a law which would affect the Kansas, Marias Des Cygnes and Neosho rivers; that the effect of the language used is to limit the act to a part only, and therefore it is a special law where a general law could have been enacted. In support the intervenors direct attention only to *Barker v. Kansas City*, 149 Kan. 696, 88 P. 2d 1071, Syl. ¶ 1 (a), where it is said, inter alia, that,

> "If a law of general form operates uniformly on all members of the class to which it applies, it is not open to the objection it is a special law if the classification is not an arbitrary and capricious one."

The state auditor directs our attention to *Owens v. City of Coffeyville*, 151 Kan. 263, 98 P. 2d 415; *Panhandle Eastern Pipe Line Co. v. Miami County Comm'r*, 151 Kan. 533, 99 P. 2d 828; *State, ex rel. v. Allen County Comm'rs*, 156 Kan. 238, 133 P. 2d 165; *Berentz v. Comm'rs of Coffeyville*, 159 Kan. 58, 152 P. 2d 53; and *Carson v. Kansas City*, 162 Kan. 455, 177 P. 2d 212, in each of which this court held a statute void because of unreasonable classification. Reference to the Kansas Digests will disclose a great number of cases,

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some of which are mentioned in the plaintiffs' brief, in which the matter of classification as made in particular cases has been under discussion. We need not review any of them here for none disputes the holding in *State, ex rel. v. Allen County Comm'rs,* supra, where a number of our decisions are cited, that:

> "The legislature has power to pass laws which apply to and operate uniformly on all members of a class, but the classification created must be natural and genuine. The classification cannot be an arbitrary or fictitious one but must be based upon distinctions which have a reasonable and substantial relation to the subject matter involved" (Syl. ¶ 1).

The rule stated was expressly approved in *Berentz v. Commrs. of Coffeyville, supra.*

Essentially the question in determining the character of the legislation is: Does the act apply to and operate uniformly on all members of the class, and is the class created a natural and genuine one, or is it arbitrary and fictitious, not based upon distinctions having a reasonable and substantial relation to the subject matter involved? If the act meets that test the legislation is general. Intervenors and the auditor contend the classification is arbitrary and unreasonable. In *Borden's Co. v. Baldwin,* 293 U. S. 194, 209, 79 L. Ed. 281, 55 S. Ct. 187, the Supreme Court, in an opinion by Hughes, C. J., said:

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> "When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. *Lindsley v. Natural Carbonic Gas Co., supra; Clarke v. Deckebach,* 274 U. S. 392, 397; *Lawrence v. State Tax Comm'n,* 286 U. S. 276, 283" (p. 209).

The following must have been apparent to the legislature when it considered and finally enacted Ch. 391. The Arkansas River enters Kansas at its western boundary and traverses or touches thirteen counties of the state in its course of hundreds of miles within the state and before it flows into the State of Oklahoma. Generally it has low banks and runs through a broad alluvial and sandy plain. Along or close to its course within the state are at least six cities having over five thousand inhabitants each, which includes Wichita, the largest city in the state. It is the only navigable stream of its type within the state, and problems connected with its flood protection vary materially from those along the Kansas River, the only other river in the state comparable in size. We need not speculate on whether the legislature may have considered other facts, for as we view the matter the above stated ones presented a situation where it could make a valid classification. Neither the intervenors nor the state auditor have pleaded any facts, nor directed attention to any matter of common knowledge or of which judicial notice should be taken, which would sustain any burden upon them to show the classification so made was arbitrary. It cannot be said the act does not operate uniformly on all members of the class included. The only contention is that to limit the act to counties traversed or touched by the Arkansas River, contravenes our state constitution. For reasons given we cannot sustain that contention.

Question No. 4 is whether Ch. 391 is unconstitutional or unenforceable as violating Art 12, § 4, of our state constitution, which provides that "No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, * * *." Intervenors direct our attention to their allegation of the estimated cost and the amount that can be raised within the tax limitations and argue that the estimate of cost exceeds the amount that may be raised and that neither the county nor the city can be *134 said to be a solvent corporation financially able to comply with the requirements of Ch. 391. In our opinion the statute is neither unconstitutional nor unenforceable.

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Waiving any discussion that the constitutional provision has no application to a public corporation (*Railway Co. v. City of Hiawatha*, 95 Kan. 471, 148 Pac. 744, and *Sullivan v. City of Goodland*, 110 Kan. 359, 203 Pac. 732) we note the following: Whether any sufficient right of way may be purchased with available funds presents no constitutional question. Whether the right of way for the proposed improvements can be purchased with the moneys available does not present a matter for judicial determination (*Kansas Power Co. v. City of Washington*, 145 Kan. 962, 67 P. 2d 1095, and *Lewis v. City of South Hutchinson*, 162 Kan. 104, 174 P. 2d 51). Cases cited dealing with the cash basis law are not in point. Nor can we consider the intervenors' argument that certain bridges must be replaced and the cost thereof included. The court is not the arbiter of the extent of the improvement. In the present status of the case we have before us only an estimate of the cost and an assessed valuation which may or may not exist when the right of way is acquired. We must assume that at the proper time the plaintiffs will each observe the statutory limitations placed upon them. Our answer to Question No. 4 is that Ch. 391 does not contravene Art. 12, § 4, of our state constitution and that it is not unenforceable on the ground urged under this heading.

The fifth question is whether Ch. 391 is unconstitutional as violating Art. 2, §1, of the state constitution, which provides that the legislative power of this state shall be vested in a house of representative and senate. In their answer intervenors pleaded that provision that the act was operative in counties where the corps of engineers of the United States army shall be authorized by the Congress to construct works, and that this made the act contingent upon the action of Congress and delegated the legislative power of the state to the Congress of the United States. In their brief intervenors state they have been unable to find any authority so holding. Without following out plaintiffs' argument, we think it must be held the contention of unconstitutionality cannot be sustained. We think under the analogy to be drawn from *City of Pittsburg* v. *Robb*, 143 Kan. 1, 53 P. 2d 203, the operation of the act being made contin-

gent upon the action of the Congress warrants no conclusion there was any delegation of legislative power.

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Intervenors concede they find no authority to support their allegations which form the basis for the sixth question: Does the fact that the construction of the project would, as to certain intervenors, make the route of highway travel longer, render Ch. 391 unconstitutional and void? We are of opinion that under cases cited by plaintiffs, *Heller* v. *Atchison, T. & S. F. R. Co.*, 28 Kan. 625; *Anderson* v. *Cloud County*, 83 Kan. 419, 111 Pac. 464; *Borton* v. *Mangus*, 93 Kan. 719, 145 Pac. 835, L.R.A. 1915 D. 142; *Bohan* v. *Sumner County Comm'rs.*, 131 Kan. 87, 289 Pac. 436; and cases cited therein, the answer to the question must be in the negative.

The seventh question: Would the fact the construction of the project might lower the level of subterranean water under lands not adjacent to a ditch to be constructed render the statute unconstitutional or void, has been answered in part in our discussion of Questions 1, 2 and 8. We shall not discuss this question further than to say that the extent of damages some intervenors may be able to recover does not present a situation involving constitutionality of Ch. 391.

Under Question No. 9 we are asked to determine whether Ch. 391 is invalid in that it enables plaintiffs to interfere with and usurp the corporate functions of the intervening drainage districts and townships. We need not review the allegations of the intervenors' answer as to expenditures made either by the drainage districts or the townships, nor their contention that right of eminent domain having been exercised by them, neither of the plaintiffs may so exercise that right as to interfere with improvements already made, in the absence of express statutory authority to that effect. Neither need we set forth the argument of plaintiffs. A short answer is that both drainage districts and townships are creatures of the legislature and neither has any rights in a case such as is before us that the legislature may not alter at its pleasure. We think it clear from the act that

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the legislature considered the construction of works for the prevention or mitigation of floods or flood hazards by the United States of America and the right of the county or city as the case may be "to acquire such lands, rights of way, or easements as may be necessary" (Ch. 391, § 2) were paramount to the needs and rights of the several townships or drainage districts, existing within the limits of or affected by the project. Ch. 391 is not invalid for the reason asserted by the intervenors.

The tenth question is, "Does the fact as alleged in paragraph 44 • 136 of Intervenors' Answer that as yet the Congress has appropriated only a part of the estimated federal cost of the project constitute any defense to the allowance of a peremptory writ?" Intervenors present no argument on this question. We noted in discussing question four that whether the improvement can be made with moneys available does not present a matter for judicial determination. And it may be further stated that we cannot assume the United States of America will not make good commitments which it has made as an inducement to the county (and city) to proceed.

Intervenors state they have not been able to find any authority on Question 11, which is: Does the fact the plaintiff County and the City of Wichita have contracted to furnish separate segments of the necessary right of way for the project constitute any defense to allowance of a peremptory writ as claimed in paragraph 48 of intervenors' answer? A study of Ch. 391 will disclose no provision for joint operation by the county and city—rather it will disclose an authorization for the county to contract with the United States of America, under conditions stated, and a like grant of authority to the city. The flood control works is in essence a single improvement. Lacking any statutory authority to permit them to join and act in one concerted proceeding, it was proper that the two governing bodies agree on the extent of right of way to be acquired by each in performing its agreement with the United States of America in order that there be no doubt of extent of liability occasioned either by overlapping or gapping in the necessary right of way. If the question of the extent of the

two segments presents a justiciable question, that question is not before us. Question No. 11 is answered in the negative.

The twelfth and thirteenth questions pertain only to the county and will be considered together. They are: (12) Is Ch. 391 void because it gives the county the right of eminent domain as provided in G. S. 1935, Ch. 26, Art 2, and (13) in exercising the right by the county under that statute, does the county board act through the city clerk and the city treasurer or the corresponding county officers? It is observed that the statute last mentioned pertains to condemnation in cities.

The answer to Question 12 is "No." Legislation by reference is not unconstitutional. See *The State, ex rel., v. Davis, Governor,* 116 Kan. 663, 229 Pac. 757 where this court upheld the constitutionality of Laws 1923, Ch. 144, under which the Revised Statutes of 1923 • 137 were adopted. In *The State v. Shawnee County,* 83 Kan. 199, 110 Pac. 92, it was held the legislature may extend the provisions of an existing statute to a new subject by appropriate reference to such statute in the new act, without violating the Constitution, and in so doing it is not necessary that any particular formula be employed. See Syllabus ¶ 1 and ¶ 4 and corresponding parts of the opinion.

Answering Question 13, the following is to be observed: In the statute the language used is that the county shall exercise the right of eminent domain "in the manner prescribed by article 2 of Chapter 26 of the General Statutes of 1935." It is not at all clear that if a very literal meaning was attached to the language the legislature could not have placed the duties upon the city offices named in the general statutes of 1935, without violating any constitutional provision, for these offices are the creatures of the legislature and it may fix their duties. But we think that is not a proper interpretation. The legislature was aware that the county clerk was the keeper of the records, papers and seal of the county (G. S. 1935, 19-304) and that the county treasurer was the custodian of county funds (G. S. 1935, 19-506) and that proceedings involving collection and payment of moneys, and of the proceedings in connection therewith would or-

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dinarily be found in these two offices and that those offices would be the ones sought for information in any condemnation proceedings instituted by the county. We are of opinion that the legislature in using the phrase "in the manner" meant only to say that in county condemnations under Ch. 391 the same duties performed by the city clerk and city treasurer in city condemnations were to be performed by the county clerk and county treasurer in county condemnations. And the same observations are applicable to publications necessary to be made. As bearing on the question see also *The State* v. *Shawnee County, supra.*

Summarizing, we hold that Ch. 391 is not unconstitutional for any reason presented by the answer of the auditor of the state of Kansas or by the answer of the intervenors, as mentioned and determined above.

In his brief, the auditor makes it clear that his refusal to register the notes tendered was not due to obstinacy but to his belief that as a state official he should not register the notes until the legal questions presented had been determined, and that if those questions are decided favorably to the plaintiffs, there is no reason why they should not have the relief for which they asked. It is apparent * 138 also that the factual situation alleged by the intervenors is not sufficient in law to justify refusal of the relief sought by the plaintiffs. In this situation no peremptory writ will issue unless it be shown later the auditor still refuses to register the notes. The costs in this court are assessed to the plaintiffs.

STATE OF KANSAS,
Supreme Court, ss:

I, Walt Neibarger, Clerk of the Supreme Court of the State of Kansas, do hereby certify, under the seal of the Court, that the foregoing pages, numbered 33 to 53, inclusive, constitute a true, full and complete copy of the opinion of the Court in Cases Number 37,477 and 37,478, captioned respectively "The Board of County Commissioners of Sedgwick County, Kansas, Plaintiff, *v.* George W. Robb, Auditor of the State of Kansas, Defendant, and The Big Slough Drainage District of Sedgwick County, Kansas, et al., In-

tervenors" and "The City of Wichita, Kansas, Plaintiff, *v.* George W. Robb, Auditor of the State of Kansas, Defendant, and The Big Slough Drainage District of Sedgwick County, Kansas, et al., Intervenors," as the same now appear in the official Kansas Reports, Volume 166, pages 122 to 138, inclusive.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Topeka, Kansas, this 18th day of March, 1949.

WALT NEIBARGER,
Clerk of the Supreme Court.

[SEAL.]

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EXHIBIT "1"

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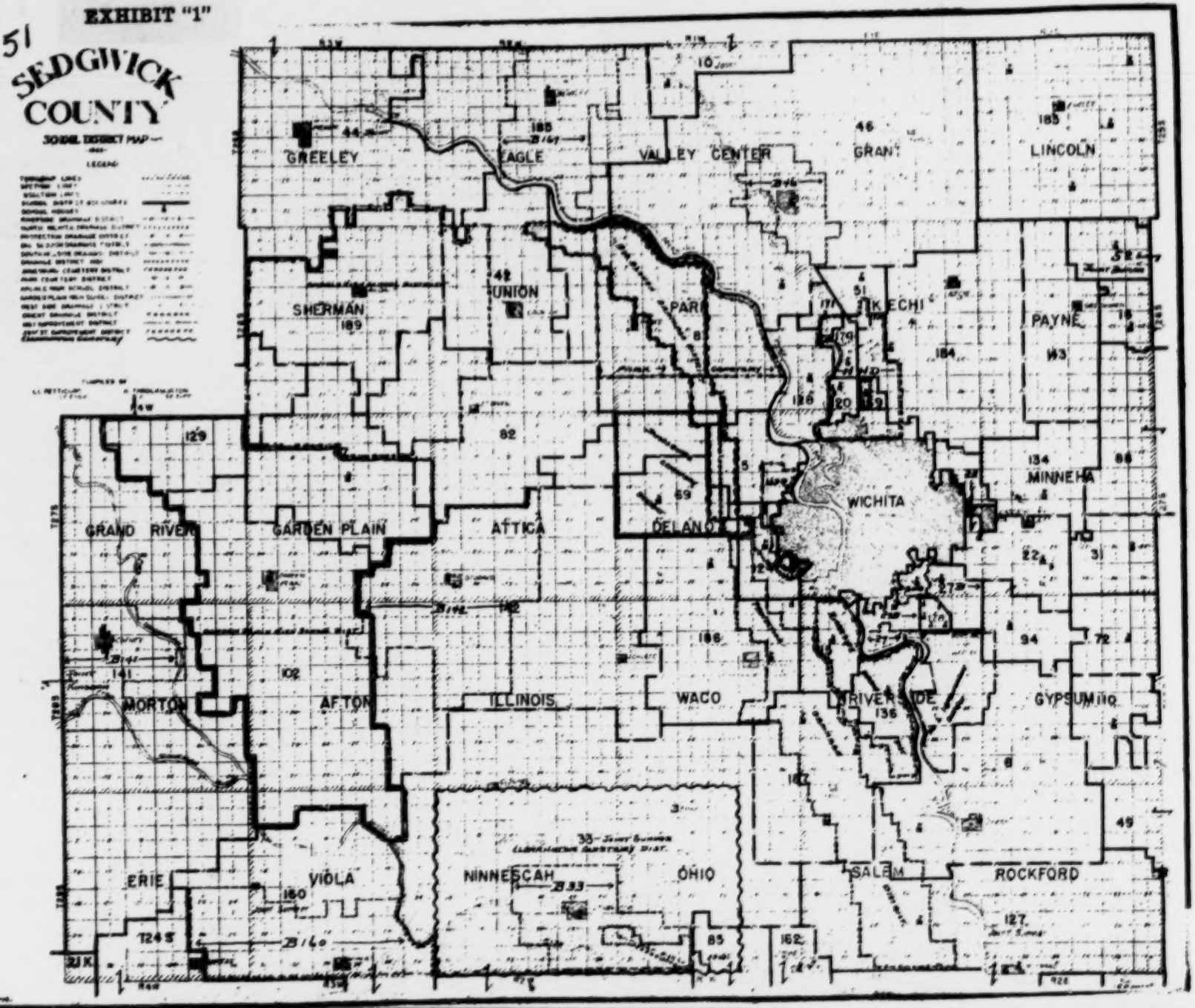

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EXHIBIT "3"

SEDGWICK COUNTY 1948 ASSESSMENTS

Townships	Personalty	Tangible Property	Moneys and Credits	Total Value
1. Afton	.....	$1,020,495	$26,920	$1,047,415
2. Attica	.....	1,592,681	31,740	1,624,421
3. Delano	982,155	4,996,637	174,950	5,171,587
4. Eagle	.....	1,509,880	179,275	1,689,155
5. Erie	.....	1,032,590	35,000	1,067,590
6. Garden Plain	.....	1,327,532	54,350	1,381,882
7. Grand River	.....	949,421	30,520	979,941
8. Grant	.....	1,893,157	159,800	2,052,957
9. Greeley	.....	1,290,631	41,000	1,331,631
10. Gypsum	.....	1,130,069	207,920	1,337,989
11. Illinois	.....	1,301,071	41,250	1,342,321
12. Kechi	.....	8,180,136	287,190	8,467,326
13. Lincoln	.....	1,242,773	174,270	1,417,043
14. Minneha	.....	5,875,464	1,152,950	7,028,414
15. Morton	.....	1,332,752	57,436	1,390,188
16. Ninnescah	.....	1,299,354	55,650	1,355,004
17. Ohio	.....	1,417,539	59,500	1,477,039
18. Park	543,939	1,975,148	35,200	2,010,348
19. Payne	.....	1,959,359	140,070	2,099,429
20. Riverside	.....	8,380,819	560,280	8,941,099
21. Rockford	.....	1,875,551	101,530	1,977,081
22. Salem	235,270	1,568,524	83,950	1,652,474
23. Sherman	.....	1,439,554	48,500	1,488,054
24. Union	.....	1,589,500	81,280	1,670,780
25. Valley Center	277,210	2,114,550	73,720	2,188,270
26. Viola	.....	1,128,576	31,180	1,159,756
27. Waco	285,100	2,030,835	54,600	2,085,435
28. Wichita	.....	6,274,495	92,460	6,366,955
Totals for Townships	.....	$67,729,093	$4,072,491	$71,801,584
Cities				
1. Andale	.....	$158,694	$17,198	$175,892
2. Cheney	.....	569,458	288,530	857,988
3. Clearwater	.....	453,532	272,486	726,018
4. Colwich	.....	175,393	104,510	279,903
5. Derby	.....	167,115	75,614	242,729
6. Eastborough	.....	1,383,814	103,140	1,486,954
7. Garden Plain	.....	158,715	17,810	176,525
8. Goddard	.....	128,596	6,100	134,696
9. Maize	.....	143,968	13,170	157,138
10. Mt. Hope	.....	351,051	146,072	497,123
11. Mulvane	.....	196,191	60,133	256,324
12. Valley Center	.....	384,563	213,228	597,791
13. Viola	.....	84,032	40,630	124,662
14. Wichita	39,152,822	166,198,936	60,964,205	227,163,141
Totals for Cities	.....	$170,554,058	$62,322,826	$232,876,884
Totals for County	56,455,633	$238,283,151	$66,395,317	$304,678,468

Total Personal Property in County	$52,809,155
Public Utilities	27,065,438
Total Real Property	158,408,558
	$238,283,155

Compiled by Otis Schweiter,
County Clerk,
June 30, 1948

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 31 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 669

THE BIG SLOUGH DRAINAGE DISTRICT of Sedgwick County, Kansas, et al, *Appellants*,

vs.

THE BOARD OF COUNTY COMMISSIONERS of Sedgwick County, Kansas, and THE CITY OF WICHITA, KANSAS, *Appellees*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

W. D. JOCHEMS
J. WIRTH SARGENT
Counsel for Appellants.

CHARLEY JONES, INC., WICHITA 7

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 669

THE BIG SLOUGH DRAINAGE DISTRICT of Sedgwick County, Kansas, et al, *Appellants*,

vs.

THE BOARD OF COUNTY COMMISSIONERS of Sedgwick County, Kansas, and THE CITY OF WICHITA, KANSAS, *Appellees*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Was the Decision of the Kansas Supreme Court A Final Judgment or Decree?

The first question raised by the appellees is whether or not a final judgment or decree (28 U. S. C. A. 1257) was rendered by the Supreme Court of Kansas.

The question of the finality of the decision of the Kansas Court is not determined or controlled by state court designation. *Cole v. Violette,* 319 U. S. 581, 87 L. ed. 1599. To be a final decree, it must end litigation by fully determining the rights of the parties so that nothing remains to be done by the lower court. *Department of Banking v. Pink,* 317 U. S. 264, 87 L. ed. 254.

A state court judgment must be subject to no further review or correction in any other state tribunal, and it must be final as an effective determination of the litigation and not merely of interlocutory or intermediate steps therein. The issues must be adjudged. A timely petition for rehearing defers finality. *Market Street R. Co. v. Railroad Com. of Cal.,* 324 U. S. 548, 89 L. ed. 1171. In determining the question of finality, the entire record will be examined. *Richfield Oil Corp. v. State Board of Eq.,* 329 U. S. 69, 91 L. ed. 80; *Gospel Army v. Los Angeles,* 331 U. S. 543, 91 L. ed. 1662; *Gulf Refining Co. v. United States,* 269 U. S. 125, 70 L. ed. 195.

Whether or not the litigation was ended by the decision of the Supreme Court of Kansas requires an analysis of the decision and a consideration of what took place in the course of the proceedings.

Although not permissible in some states (16 C. J. S., page 219, sec. 95), in Kansas the question of the constitutionality of a statute may be raised in a mandamus proceeding. On two different occasions, the question of the constitutionality of Kansas statutes was raised in mandamus actions, and the cases have been affirmed in this Court. *Wear v. Kansas ex rel. Brewster,* 92 Kan. 169, 140 Pac. 637, Ann. Cas. 1916B 543, affirmed 245

U. S. 154, 62 L. ed. 214; *In re Insurance Tax Cases,* 160 Kan. 300, 161 P. 2d 726, affirmed 328 U. S. 822, 90 L. ed. 1602.

While in this case the prayer was to have a writ issued to the auditor, *the real question raised,* as shown by the opinion of the court, was the constitutionality of Chapter 391. We quote from the opinion, 166 Kan. 122:

> "In a preliminary way, it may be said that in each case the principal question raised is the constitutionality of chapter 391, . . ." (l.c. 123)

Also, at page 126, the Supreme Court of Kansas said:

> "In asking this court to rule on the questions submitted, the obvious purpose is to procure a declaration as to the soundness and validity of the several claims of unconstitutionality asserted in the answers of the defendant and of the intervenors. . . ."

For years, a method of testing the legality, regularity or constitutionality of statutes has been by so-called friendly suits. A typical case (1) is that of *State v. Akers,* 92 Kan. 169, 140 Pac. 637, affirmed 245 U. S. 154, 62 L. ed. 214, where it was said:

> "This is an original action in mandamus, the purpose of which is to test the constitutionality of chapter 259 of the Session Laws of 1913." (l.c. 171)

With the foregoing in mind, what was the decree or judgment of the Kansas Supreme Court? Admittedly, the questions in the original opinion of the Supreme

(1) Similar cases, involving the validity of bonds as against the contention that the law authorizing their issuance was unconstitutional are *City of Pittsburg v. Robb,* 143 Kan. 1, 53 P. 2d 203; *State ex rel., v. Robb,* 143 Kan. 527, 55 P. 2d 815.

Court arose upon the motion of plaintiffs to determine questions of law raised by the answers of the intervenors and defendant, and in the determination of these questions at law, the allegations of the answers, for the purpose of appellees' motion, *were necessarily admitted.* The Court had before it the answer of the intervenors and all questions of the constitutionality of Chapter 391. Having this before it, the Supreme Court of Kansas made the following statements in its opinion:

> ". . . In our opinion, it may not be said the act is unconstitutional as being arbitrary, or confiscatory of private property, or that under its terms it results in taxation of one who does not receive some benefit from the tax." (l.c. 131)
>
> ". . . we conclude that chapter 391 is not unconstitutional as depriving taxpayers of their right of due process of law under the fourteenth amendment of the federal constitution . . . nor because it provides for the payment of bonds issued thereunder by general taxation upon all taxable property within the county (or city) for any of the reasons above mentioned." (l.c. 131)
>
> "Summarizing, we hold that chapter 391 is not unconstitutional for any reason presented by the answer of the auditor of the state of Kansas or by the answer of the intervenors, as mentioned and determined above." (l.c. 137)
>
> ". . . It is apparent also that the factual situation alleged by the intervenors is not sufficient in law to justify refusal of the relief sought by the plaintiffs. . . ." (l.c. 137 and 138)

Not content with the *intermediate step* of answering the questions of law submitted by appellees' motion, the Supreme Court of Kansas, *deus ex machina,* ended the litigation by the following:

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". . . The auditor makes it clear that his refusal to register the notes tendered was not due to obstinancy . . . In this situation no peremptory writ will issue unless it be shown later the auditor still refuses to register the notes. . . ." (l.c. 137, 138)

Everything was done and decided EXCEPT THE MINISTERIAL ACT OF ISSUING THE PEREMPTORY WRIT. It was, therefore, a final judgment and decree. *Gospel Army v. Los Angeles,* supra; *Detroit and M. R. Co. v. Michigan R. Com.,* 240 U. S. 564, 60 L. ed. 802.

The practical result of the decision of the Kansas Supreme Court handed down November 13, 1948, is that it found no merit in the answers of the intervenors or of the defendant and concluded that it *was not even necessary to issue a peremptory writ* to the auditor for the reason that it would be apparent from the decision, and the auditor would recognize, that there was no longer any reason for him to refuse to register the notes.

To be sure that the decision of the Supreme Court of Kansas would not be subject to further review as having determined only an intermediate step, and to crystallize the court's attention to the *uncontroverted*(2) answer of the intervenors, and to have the Kansas

(2) In appellees' motion to dismiss, it is alleged there is a "misjoinder of diverse intervening interests" and that the issues of fact were not admitted to be true. Objections to the pleadings to be considered in the Supreme Court of the United States should have been made in the court below. *Burley v. German American Bank,* 111 U. S. 216, 28 L. ed. 406. *Partridge v. Phoenix Mutual Life Ins. Co.,* 15 Wall., 573, 21 L. ed. 229. Further, the motion for judgment filed stated "that in view of the uncontroverted Answer of Intervenors, the writs of mandamus should not issue." No objection was made by appellees to a determination of this motion upon the premise stated in the motion that the answer was *uncontroverted.* In considering the motion to determine questions of law, the answer necessarily was deemed to be true. See also (3), post.

Supreme Court decide whether or not the intervenors' answer entitled intervenors to judgment, the intervenors filed a motion for rehearing and a motion for judgment. The motion for judgment reads as follows:

> "Come now the intervenors and move the Court to enter judgment in favor of the intervenors and refuse to issue the writs of mandamus directed to the State Auditor for the reason that in view of the uncontroverted Answer of Intervenors, the writs of mandamus should not issue since Chapter 391 of the Session Laws of Kansas, 1945, as amended by Chapter 202 of the Session Laws of Kansas, 1947, now appearing as Sections 19-3301 to 19-3307, inclusive, of the 1947 Supplement to the General Statutes of Kansas, 1935, is unconstitutional and void and repugnant to the Fourteenth Amendment to the Constitution of the United States, and intervenors pray that the Court so hold." (R. 66)

Both motions were denied by the Supreme Court of Kansas on December 20, 1948 (R. 70, 71), and the result of the ruling on the motions is to reaffirm that the answer of the intervenors presented no reason for holding Chapter 391 unconstitutional and that the factual situation alleged by the intervenors was not sufficient in law to *justify the refusal of the relief sought by plaintiffs.*

The final outcome is that the answer of the defendant amounts to nothing. The ruling of the Kansas Supreme Court is equivalent to a demurrer to the answer.

That this is a final decision would appear from *Fidelity Life Ass'n. v. Hobbs,* 161 Kan. 163, 166 P. 2d 1001, syllabus 2 of which reads as follows:

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> "Where in a mandamus action the plaintiff's cause of action is admitted and no facts are alleged in the answer which would defeat the admissions the plaintiff is entitled to judgment." (3)

That the appellees considered the judgment was final would appear from the fact (alleged to be true in their motion to dismiss or affirm) that the notes have been registered with the auditor of state.

In determining whether or not the judgment appealed from is final, this Court looks through form to substance (4). While the relief sought is the writ, the real question before the Kansas Supreme Court and the real question decided adversely to appellants was the constitutionality of Chapter 391.

Any allegations made in any future proceeding similar to those allegations in intervenors' answer could be demurred to — no evidence could be introduced because the objection would be made that such evidence would not constitute a defense to an injunction action or to a mandamus action, and the consequence is that the Supreme Court of Kansas decided with finality against the contention of appellants that Chapter 391 was repugnant to the Fourteenth Amendment to the Federal Constitution.

---

(3) See, also, *State ex rel., v. Reno County Comm'rs.*, 158 Kan. 573, 144 P. 2d 1012, where it was said:

> ". . . We think the motion for judgment properly raised the question whether the allegations of the answer, taken as true, stated a defense, and that it was proper for the trial court to rule on the motion." (l.c. 576)

(4) *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U. S. 249, 77 L. Ed. 730, 87 A. L. R. 1191. See quotations from this case, Appendix A, post, pages 13 to 15.

Appellees state they made a reservation in their motions as follows:

> "This motion is without prejudice to or waiver of, and plaintiff reserves, the right to further plead after this motion is passed on and to proceed to trial should there remain issues of fact for trial." (R. 30 and 33)

The effect and purpose of this reservation in the motion is simply this — that if the Supreme Court of Kansas should have decided that Chapter 391 was unconstitutional because of one or more of the allegations in appellants' answer, then the appellees would have the opportunity of controverting the issues of fact. Such a declaration of law made upon the motion of appellees obviously would not be a final judgment and would not be appealable. If such a situation had arisen, i.e., if the Supreme Court of Kansas had declared Chapter 391 unconstitutional because of appellants' allegations in paragraph 7 (R. 40) or the allegations concerning omission of bridges, paragraph 38 (R. 55), then, before the city and county would have a final judgment to appeal from, there would have to be a determination that the allegations in paragraph 7, that the lots owned by Stearns were not subject to overflow from the Big Arkansas River, and the allegations of paragraph 38, regarding the omitted bridges, were true. When there was such a determination by a special master (a proper proceeding to determine facts in mandamus actions, *City of Iola v. Hobart,* 141 Kan. 709, 42 P. 2d 977) and judgment was rendered, it would be a final judgment, and the City and County could appeal.

But appellants are in a different position. The Kansas Supreme Court has decided that the factual situa-

tion alleged by intervenors was insufficient. As against all contentions of appellants, the case has been decided and all issues adjudged by the Kansas Supreme Court.

If appellants had not taken the appeal which they have taken, but had waited ninety days after December 20, 1948, for what appellees now contend would be a final judgment — although we do not know what they have in mind — then upon taking such appeal, after the expiration of ninety days, appellants would be met by the argument of appellees that the December 20, 1948, judgments (R. 70 and 71) were final and appellees would present a better argument for the theory of finality of the judgments than is herewith submitted. In such event, appellants would find themselves in the position of the appellant in the case of *Cole v. Violette,* supra.

We therefore respectfully submit that the judgments appealed from are final.

Is The Present Controversy Moot?

In presenting this question, appellees again stress the ministerial act of issuing a peremptory writ and overlook the real question decided — the constitutionality of Chapter 391 of the Session Laws of Kansas.

Stating in their motion that intervenors, without hearing and *ex parte,* procured leave to file an answer, they would imply that intervenors were not desired in the action, whereas the proceeding had been instituted by agreement between counsel to procure a ruling on the constitutionality of Chapter 391. (See affidavit, Appendix B, *post,* pages 16, 17) Further, any such objection should have been made in the Kansas Supreme Court

(*Alviso v. United States,* 8 Wall. 337, 19 L. ed. 305). While the Auditor of the State was the defendant and filed an answer, if intervenors had not appeared the lawsuit would have been a sham battle.

The foregoing is mentioned to show that the real parties in interest are the intervenors, and that the real question determined was the constitutionality of Chapter 391. Under such circumstances, the act of the Auditor, without notice to or knowledge of the intervenors, in carrying out the wishes of the City and County by registering the notes cannot bind or prejudice the intervenors and appellants. As also appears from the affidavit, Appendix B. *post,* pages 16, 17, the full circumstances regarding the "registration" and "sale" of the notes are not before this Court. At all events, the bank was charged with knowledge of intervenors' right to appeal.

In their contention that this controversy is moot, appellees rely upon *Codlin v. Kohlhausen,* 181 U. S. 151, 45 L. ed 793, and *Brownlow v. Schwartz,* 261 U. S. 216, 67 L. ed. 620, but in those cases there was only an action between plaintiff and defendant. There were no intervenors. While it might be said that the case is moot as between plaintiffs and defendant, Robb, the conduct of the plaintiffs and defendant could not preclude the intervenors.

As we have noted, mandamus is a proper method of determining the question of constitutionality. Intervenors are proper parties in such an action, and have the right to appeal. *Ex parte Jordan,* 4 Otto 248, 24 L. ed. 123; *International Union v. Eagle Picher M. & S. Co.,* 325 U. S. 335, 89 L. ed 1649. We have not been able to

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find a case holding that the defendant in a mandamus action can prejudice the rights of intervenors on appeal by consenting to the judgment, particularly when the intervenors are the real parties in interest.

A moot case is defined in 1 C. J. S., page 1016, as follows:

> "A moot case is one in which there is no real controversy; a case which seeks to determine an abstract question which does not rest on existing facts or rights.
>
> "A moot case or question, within the meaning of the rule stated above in §17a that a court ordinarily will not decide such a case or question, is a case or question in or on which there is no real controversy; a case which seeks to determine an abstract question which does not rest on existing facts or rights, or involve conflicting rights so far as plaintiff is concerned.
>
> "As otherwise defined, a moot case is a case which seeks to get a judgment on a pretended controversy when in reality there is none, or to get a decision in advance about a right before it has been actually asserted or contested, or a judgment on some matter which, when rendered, cannot, for any reason, have any practical legal effect upon a then existing controversy; a case in which no relief can be granted, or in which no judgment rendered can be carried into effect, or in which no decree consistent with both the pleadings and the existing facts will benefit any party as against the other parties to the litigation.
>
> "A case, however, is not moot when there is a real controversy therein to be determined, as where valuable rights are claimed by one party and denied by the other; and where there is such a controversy that the court, in the first instance, has

jurisdiction to determine certain rights, the case does not become moot, and the court's power to continue the proceeding taken away, by the fact that some of the original parties to the action have sold or conveyed their rights to others and that issues formerly raised may not have to be tried."

We therefore believe that the present case does not come under the above definition of a moot case. The intervenors were proper parties in the action and had the right to appeal. The full circumstance of what took place when the bonds were "registered" and "sold" is not before the court, and intervenors have had no opportunity to cross-examine witnesses having full knowledge of the facts. In view of the foregoing, the controversy is not moot, and a real controversy between parties adversely interested is presented.

The motion to affirm or dismiss should be denied.

Respectfully submitted,

W. D. JOCHEMS
J. WIRTH SARGENT
Counsel for Appellants.

Dated March 28, 1949.

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APPENDIX A

Nashville, C. & St. L. R. Co. v. Wallace, 288 U. S. 249 77 L. ed. 730.

That the opinion of the Supreme Court of Kansas in the case at issue is similar to a judgment rendered in a declaratory judgment action would appear from the following quotation from page 126 of the opinion:

> "In asking this court to rule on the questions submitted, the obvious purpose is to procure a *declaration* as to the soundness and validity of the several claims of unconstitutionality asserted in the answers of the defendant and of the intervenors. . . ." (Emphasis supplied)

Inasmuch as many of the reasons announced by this court for accepting jurisdiction in an appeal from a declaratory judgment are also present in this case, we quote from the *Nashville* case, *supra,* as follows:

> "In determining whether this litigation presents a case within the appellate jurisdiction of this Court, we are concerned, not with form, but with substance. See Fidelity Nat. Bank & T. Co. v. Swope, 274 U. S. 123, 71 L. ed 959, 47 S. Ct. 511, compare Gasoline Products Co. v. Champlin Ref. Co., 283 U. S. 494, 498, 75 L. ed. 1188, 1190, 51 S. Ct. 513. Hence, we look not to the label which the legislature has attached to the procedure followed in the state courts, or to the description of the judgment which is brought here for review, in popular parlance as 'declaratory,' but to the nature of the proceeding which the statute authorizes, and the effect of the judgment rendered upon the rights which the appellant asserts." (l.c. 259)
>
> "That the issues thus raised and judicially determined would constitute a case or controversy if

raised and decided in a suit brought by the taxpayer to enjoin collection of the tax cannot be questioned. See Risty v. Chicago, R. I. & P. R. Co., 270 U. S. 378, 70 L. ed. 741, 46 S. Ct. 236, compare Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 S. Ct. 15; Pierce v. Society of Sisters, 68 U. S. 510, 69 L. ed. 1070, 45 S. Ct. 571, 39 A. L. R. 468, Euclid v. Amber Realty Co., 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A. L. R. 1016. The proceeding terminating in the decree below, unlike that in South Spring Hill Gold Min. Co. v. Amador Medean Gold Mining Co., 145 U. S. 300, 36 L. ed. 712, 12 S. Ct. 921; Muskrat v. United States, 219 U. S. 346, 55 L. ed. 246, 31 S. Ct. 250, was between adverse parties, seeking a determination of their legal rights upon the facts alleged in the bill and admitted by the demurrer. Unlike Fairchild v. Hughes, 258 U. S. 126, 66 L. ed. 499, 42 S. Ct. 274; Texas v. Interstate Commerce Commission, 258 U. S. 158, 66 L. ed. 531, 42 S. Ct. 261; Massachusetts v. Mellon, 262 U. S. 447, 67 L. ed. 1078, 43 S. Ct. 597; New Jersey v. Sargent, 269 U. S. 328, 70 L. ed. 289, 46 S. Ct. 122, valuable legal rights asserted by the complainant and threatened with imminent invasion by appellees, will be directly affected to a specific and substantial degree by the decision of the question of law; and unlike Luther v. Borden, 7 How. 1, 12 L. ed. 581; Field v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 S. Ct. 495; Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U. S. 118, 56 L. ed. 377, 32 S. Ct. 224; Keller v. Potomac Electric Power Co., 261 U. S. 428, 67 L. ed. 731, 43 S. Ct. 445; Federal Radio Commission v. General Electric Co., 281 U. S. 464, 74 L. ed. 969, 50 S. Ct. 389, the question lends itself to judicial determination and is of the kind which this Court traditionally decides. The relief sought is a definite adjudication of the disputed constitutional right of the appellant, in the circumstances

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alleged, to be free from the tax, see Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716, 724, 73 L. ed. 918, 925, 49 S. Ct. 499 . . ." (l.c. 261 and 262)

"The issues raised are the same as those which under old forms of procedure could be raised only in a suit for an injunction or one to recover the tax after its payment. But the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystalize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. Whenever the judicial power is invoked to review a judgment of a state court, the ultimate constitutional purpose is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States. The states are left free to regulate their own judicial procedure. Hence, changes merely in the form or method of procedure by which federal rights are brought to final adjudication in the state courts are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical controversy, which is finally determined by the judgment below. . . ." (l.c. 264)

APPENDIX B

Affidavit

State of Kansas, County of Sedgwick, ss:

J. Wirth Sargent, of lawful age, being first duly sworn upon his oath, states that in May and June of 1948, he had several conferences with W. F. Lilleston and Wayne Coulson; that in these conferences, affiant was representing parties against the Army Plan of flood control, Wayne Coulson was representing the City of Wichita, and W. F. Lilleston was representing the Board of County Commissioners of Sedgwick County, Kansas; that W. F. Lilleston proposed in substance that the City and County file a mandamus action against the State Auditor asking for a writ of mandamus to require the State Auditor to issue certain notes. W. F. Lilleston also proposed, in substance, that this affiant, acting for and on behalf of his clients, intervene in said action so that there could be a determination by the Supreme Court of Kansas of the constitutionality of Chapter 391 without the necessity of having a trial in the District Court of Kansas, and an appeal later to the Supreme Court; that he proposed that the intervenors set up all objections which they had to the constitutionality of Chapter 391 so that such questions could be determined by the Supreme Court of Kansas. Affiant states that he agreed to that procedure, filed an application for leave to intervene, and later filed an answer on behalf of the intervenors.

Affiant further states that prior to November 23, 1948, he personally told Wayne Coulson and W. F. Lilleston that he intended to file a motion for rehearing and a

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motion for judgment and that if the motions were overruled that he had been authorized by his clients to appeal to the Supreme Court of the United States; and affiant states that he advised Wayne Coulson and W. F. Lilleston that if the motions were denied he would file an appeal on behalf of his clients, the intervenors.

Affiant further states that two or three days prior to March 11, 1949, he consulted with Wayne Coulson and W. F. Lilleston regarding the transcript of the record in the Supreme Court in an attempt to come to an agreement upon the contents of the transcript; that upon returning to his office, he received a telephone call from Wayne Coulson advising, in substance, the following: That Wayne Coulson had just learned that the City had registered its bond with the State Auditor; that the City had sold the bond; that it did so because otherwise its books would be out of balance; that the County had done likewise.

Affiant states that he has no knowledge concerning the conditions or terms of the sale of the registered notes to The Fourth National Bank in Wichita but does know that most of the officers of The Fourth National Bank have knowledge of the decision of the Kansas Supreme Court.

Subscribed and sworn to before me this 28th day of March, 1949.

Hazel M Jones
Notary Public

My commission expires: 9-17-52

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 669

THE BIG SLOUGH DRAINAGE DISTRICT OF SEDGWICK COUNTY, KANSAS, ET AL.,
Appellants,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS OR AFFIRM

FRED W. ALEY,
City Attorney;
LAWRENCE E. CURFMAN,
Assistant City Attorney;
HOWARD T. FLEESON,
WAYNE COULSON,
L. A. HASTY,
W. F. LILLESTON,
CHARLES S. RHYNE,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 669

THE BIG SLOUGH DRAINAGE DISTRICT OF SEDGWICK COUNTY, KANSAS; THE RIVERSIDE DRAINAGE DISTRICT OF SEDGWICK COUNTY, KANSAS; THE PROTECTION DRAINAGE DISTRICT OF SEDGWICK COUNTY, KANSAS; VALLEY CENTER TOWNSHIP OF SEDGWICK COUNTY, KANSAS; PARK TOWNSHIP OF SEDGWICK COUNTY, KANSAS; WACO TOWNSHIP OF SEDGWICK COUNTY, KANSAS; DELANO TOWNSHIP OF SEDGWICK COUNTY, KANSAS; RIVERSIDE TOWNSHIP OF SEDGWICK COUNTY, KANSAS; SALEM TOWNSHIP OF SEDGWICK COUNTY, KANSAS; WM. D. McDOWELL, J. R. STEARNS, G. WILBUR, B. B. MEYER, H. W. RALSTIN, H. S. LOYD, AND E. CARL JONES,

Appellants,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS, AND THE CITY OF WICHITA, KANSAS,

Appellees

MOTION OF APPELLEES, THE BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS, AND THE CITY OF WICHITA, KANSAS, TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM.

Come now the appellees, The Board of County Commissioners of Sedgwick County, Kansas and The City of Wichita, Kansas, and each of them, and respectfully move

the court to dismiss the appeal in this case for each and all of the following reasons:

1. The order appealed from (Transcript pp. 70, 71) is not a final judgment or decree and is not appealable (28 U. S. C. A. Sec. 344). It is a mere order overruling the intervenors' motion for judgment on the pleadings. In Kansas the final judgment in a proceeding in mandamus is a peremptory writ of mandamus (Sections 60-1708, 1710, General Statutes of Kansas, 1935), and no peremptory writ has issued or other final judgment or order been made or entered in these proceedings.

SUPPORTING STATEMENT

These proceedings below were consolidated mandamus proceedings originally brought in the Supreme Court of Kansas by The City of Wichita and The Board of County Commissioners of Sedgwick County against George W. Robb, Auditor of State of the State of Kansas (not a party to this appeal) to require the defendant Auditor to register temporary notes, and the appellants here (intervenors below) without hearing and ex parte procured leave to file answers, and did so. Under the Kansas statutes, upon application for a writ of mandamus the practice obtained and followed in these proceedings was and is for the court to allow an alternative writ (to show cause) and that alternative writ and the answers thereto are the only pleadings allowed in the case (Sec. 66-1709, General Statutes of Kansas, 1935).

The answers of intervenors (appellants here) tendered various issues of *fact* (still untried) in support of the federal constitutional questions presented by them. However, pursuant to the practice permitted in and by the Supreme Court of the State of Kansas and followed in this case, each of the plaintiffs below filed its separate preliminary motion

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entitled "Plaintiffs' Motion for Determination of Issues of *Law* in Advance of Trial," expressly reserving in said motion the right to "proceed to trial should there remain issues of fact for trial."

The opinion of the Supreme Court of the State of Kansas was confined to the questions of law thus preliminarily presented in said motions and each of them. No evidence was ever taken, introduced or received by the Supreme Court of Kansas in said litigation. After the opinion was handed down on certain questions of law as aforesaid, the appellants here (intervenors below) filed their Motion for Judgment (Transcript 66), and it is from a mere docket entry—"motion by Intervenors for judgment denied" (Transcript pp. 70, 71)—overruling that motion for judgment, that appellants have appealed.

The facts set out in the Answer of Intervenors were *not* (as stated in paragraph 1 of Appellants' Assignment of Errors) admitted to be true, and the record nowhere shows said or any such admission. By statute, in mandamus proceedings in Kansas, "if answer be made, containing new matter, *the same shall not, in any respect, conclude the plaintiff*, who may, *on the trial* or other proceeding, *avail himself of any valid objections to its sufficiency*, or may countervail it by proof, either in direct denial or by way of avoidance" (Sec. 60-1708, General Statutes of Kansas, 1935). Notwithstanding this provision of the statute, the plaintiffs out of an abundance of caution expressly reserved the right to further plead and to go to trial, as indicated in the last paragraph of Plaintiffs' Motion for Determination of Issues of Law in Advance of Trial (Transcript 30, 33).

The Supreme Court of Kansas has original jurisdiction only of proceedings in mandamus, quo warranto and habeas corpus (Constitution of Kansas, Art. 3, Sec. 3); that is to say, its *only* jurisdiction here is in mandamus. It is elementary that intervention is in subordination to the prin-

cipal case. Now there has been no determination of such questions as (1) the jurisdiction of the Supreme Court of Kansas of such remaining collateral matters upon intervention in a mandamus proceeding *now moot* (the Auditor having registered the notes), or (2) the misjoinder of the diverse intervening interests here alleging various issues in connection with contemplated condemnations and damage claims with respect to their scattered and separate properties, the obvious position of the plaintiffs being that other courts are the proper tribunals of first instance and other remedies adequate to accord due process of law to the intervenors if and when condemnation should ensue.

There has been and is no final judgment or decree to appeal from.

2. On December 29, 1948, the defendant George W. Robb, as Auditor of State of the State of Kansas, afforded to appellee, City of Wichita, the only relief sought by it in the action by registering said appellee's Improvement Temporary Note of The City of Wichita, Kansas, Series 13, Number 1, dated July 1, 1948, copy of which was attached to the alternative writ of mandamus. Said note was sold by said appellee to the Fourth National Bank in Wichita, Kansas, on December 31, 1948. The controversy at one time existing between the parties ceased to exist and the cause became moot long prior to the allowance of the appeal (*Codlin* v. *Kohlhausen*, 181 U. S. 151; *Brownlow* v. *Schwartz*, 261 U. S. 216); that on December 28, 1948, the defendant George W. Robb, as Auditor of State of the State of Kansas, afforded to appellee, The Board of County Commissioners of Sedgwick County, Kansas, the only relief sought by it in these proceedings by registering said appellee's temporary note, the registration of which was sought by said Board in these mandamus proceedings, and said note was sold and delivered by the appellee Board to the Fourth National Bank

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in Wichita, Kansas on January 25, 1949; that appellants are only intervenors entering the litigation in subordination to the principal case, which became moot before this appeal was taken or sought.

In the alternative, appellees and each of them move the court to affirm the orders appealed from because the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, in support of which appellees call attention to the opinion of the court below reported in 166 Kan. 122, 199 P. 2d 530, the opinion in the companion case of *Cow Creek Valley Flood Prevention Assn.* v. *Glick*, 166 Kan. 78, 200 P. 2d 299, decided the same day, and to the decisions of this Court cited in the two opinions.

FRED W. ALEY,
City Attorney;
LAWRENCE E. CURFMAN,
Assistant City Attorney;
HOWARD T. FLEESON,
WAYNE COULSON,
L. A. HASTY,
W. F. LILLESTON,
CHARLES S. RHYNE,
Counsel for Appellees.

STATE OF KANSAS,
Sedgwick County, ss:

Wayne Coulson, of lawful age, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for appellee, The City of Wichita, and has been at all times hereinafter mentioned, and has personal knowledge of the facts hereinafter appearing; That on December 29, 1948, the defendant George

W. Robb, as Auditor of State of the State of Kansas, afforded to appellee, City of Wichita, the only relief sought by it in the action by registering said appellee's Improvement Temporary Note of The City of Wichita, Kansas, Series 13, Number 1, dated July 1, 1948, copy of which was attached to the alternative writ of mandamus. Said note was sold by said appellee to the Fourth National Bank in Wichita, Kansas, on December 31, 1948.

WAYNE COULSON.

Subscribed and sworn to before me by Wayne Coulson of Wichita, Sedgwick County, Kansas, this March 11, 1949.

ETHYL McMURRY,
[SEAL.] *Notary Public in and for*
Sedgwick County, Kansas.

My commission expires February 22, 1951.

STATE OF KANSAS,
Sedgwick County, ss:

L. A. Hasty, of lawful age, being first duly sworn, deposes and says:

That he is attorney and County Counselor for The Board of County Commissioners of Sedgwick County, Kansas and has been at all times hereinafter mentioned, and that he has personal knowledge of the facts hereinafter alleged; that on December 28, 1948, the defendant George W. Robb, as Auditor of State of the State of Kansas, afforded to appellee, The Board of County Commissioners of Sedgwick County, Kansas, the only relief sought by it in these proceedings by registering said appellee's temporary note, the registration of which was sought by said Board in these mandamus proceedings, and said note was sold and

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delivered by the appellee Board to the Fourth National Bank in Wichita, Kansas on January 25, 1949.

L. A. HASTY.

Subscribed and sworn to before me by L. A. Hasty at Wichita, Sedgwick County, Kansas, this March 11, 1949.

ETHYL McMURRY,
Notary Public in and for
Sedgwick County, Kansas.

[SEAL.]

My commission expires February 22, 1951.

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No. 669. BIG SLOUGH DRAINAGE DISTRICT OF SEDGWICK COUNTY ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY ET AL. Appeal from the Supreme Court of Kansas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *J. Wirth Sargent* for appellants. *Charles S. Rhyne* for appellees. Reported below: 166 Kan. 122, 199 P. 2d 530.